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(Slip Opinion)

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Lumber Co.*, 200 U. S. 321, 337.

SUPREME COURT OF THE UNITED STATES

COMPLETED

Syllabus

TEXACO, INC., ET AL. *v.* SHORT ET AL.

APPEAL FROM THE SUPREME COURT OF INDIANA

No. 80-965. Argued October 6, 1981—Decided January 12, 1982*

The Indiana Dormant Mineral Interests Act, more commonly known as the Mineral Lapse Act, provides that a severed mineral interest that is not used for a period of 20 years automatically lapses and reverts to the current surface owner of the property, unless the mineral owner prior to the end of the 20-year period or within a 2-year grace period after the effective date of the Act (September 2, 1971) files a statement of claim in the local county recorder's office. The "use" of a mineral interest sufficient to preclude its extinction includes actual or attempted production of the minerals, payment of rents or royalties, and payment of taxes. The statute contains one exception to the general rule: If an owner of 10 or more mineral interests in the same county files a statement of claim that inadvertently omits some of those interests, the omitted interests may be preserved by a supplemental filing made within 60 days of receiving notice of the lapse. Appellants whose unused mineral interests had lapsed upon expiration of the grace period under the Act, challenged the constitutionality of the Act in actions brought in Indiana state court. They claimed that under the Fourteenth Amendment the lack of prior notice of the lapse deprived them of property without due process of law, the statute effected a taking of property for public use without just compensation, and the exception for owners of 10 or more mineral interests denied them the equal protection of the law. They also contended that the statute constitutes an impairment of contracts in violation of the Contract Clause. The trial court declared the statute unconstitutional, but the Indiana Supreme Court reversed.

Held:

1. The State has the power to enact the kind of statute in issue, and in

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*Together with No. 80-1018, *Pond et al.* v. *Walden et al.*, also on appeal from the same court.

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this instance has not exercised this power in an arbitrary manner. Each of the actions required to avoid an abandonment of a mineral interest furthers the legitimate state goals of encouraging mineral interest owners to develop such interests and of collecting property taxes. Pp. 8–13.

2. The Act does not take property without just compensation in violation of the Fourteenth Amendment. Since the State may treat as abandoned a mineral interest that has not been used for 20 years and for which no statement of claim has been filed, it follows that, after abandonment, the former owner retains no interest for which he may claim compensation. It is the owner's failure to make any use of the property—and not the State's action—that causes the lapse of the property right; there is no "taking" that requires compensation. P. 14.

3. Nor does the Act unconstitutionally impair the obligation of contracts. Since appellant mineral owners did not execute any coal and oil leases until after the statutory lapse of their mineral rights, the statute cannot be said to impair a contract that did not exist at the time of its enactment. While appellants' right to enter such an agreement has been impaired, this right is a property, not a contract, right. Pp. 14–15.

4. The Act did not extinguish appellants' property without adequate notice in violation of their due process rights. P. 15–22.

(a) The 2-year grace period provided by the statute forecloses any argument that the statute is invalid because mineral owners may not have had an opportunity to become familiar with its terms. Property owners are charged with knowledge of relevant statutory provisions affecting the control or disposition of their property. Moreover, the greatest deference must be accorded to the judgment of state legislatures as to whether a statutory grace period provides an adequate opportunity for citizens to become familiar with a new law. Here, both the Indiana Legislature and the Indiana Supreme Court have concluded that the 2-year grace period was sufficient to allow property owners to familiarize themselves with the statute and to take appropriate action to protect existing interests. Pp. 15–17

(b) Given appellants' presumed knowledge that their unused mineral interests would lapse unless they filed a statement of claim, appellants had no constitutional right to be advised that the 20-year period of nonuse was about to expire. *Mullane* v. *Central Hanover Bank and Trust Co.*, 339 U.S. 306, distinguished. Since the State may impose on a mineral interest owner the burden of using that interest or filing a statement of claim, it follows that the State may impose on him the lesser burden of keeping informed of the use or nonuse of his own property. Pp. 17–22.

5. Since the statutory exception for owners of 10 or more mineral in-

Syllabus

terests furthers the legitimate statutory purpose of encouraging multiple ownership as being more conducive to the actual production of mineral resources, and has no adverse impact on persons like appellants who own fewer mineral interests, the exception does not violate the Equal Protection Clause of the Fourteenth Amendment. Pp. 22–24.

—— Ind. ——, 406 N. E. 2d 625, affirmed.

STEVENS, J., delivered the opinion of the Court, in which BURGER, C. J., and BLACKMUN, REHNQUIST, and O'CONNOR, JJ., joined. BRENNAN, J., filed a dissenting opinion, in which WHITE, MARSHALL, and POWELL, JJ., joined.

NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D.C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

SUPREME COURT OF THE UNITED STATES

Nos. 80-965 AND 80-1018

TEXACO, INC., ET AL., APPELLANTS
80-965 v.
LOUISE F. SHORT ET AL.

EDEN H. POND, EDNA H. BOBE AND CONSOLIDATION COAL COMPANY, APPELLANTS
80-1018 v.
ULYSSES G. WALDEN, JR., ET AL.

ON APPEAL FROM THE SUPREME COURT OF INDIANA

[January 12, 1982]

JUSTICE STEVENS delivered the opinion of the Court.

In 1971 the Indiana Legislature enacted a statute providing that a severed mineral interest that is not used for a period of 20 years automatically lapses and reverts to the current surface owner of the property, unless the mineral owner files a statement of claim in the local county recorder's office.[1] The Indiana Supreme Court rejected a challenge to the constitutionality of the statute. —— Ind. ——, 406 N. E. 2d 625 (1980). We noted probable jurisdiction, —— U. S. ——, and now affirm.

As the Indiana Supreme Court explained, the Mineral Lapse Act "puts an end to interests in coal, oil, gas or other minerals which have not been used for twenty years."[2] The statute provides that the unused interest shall be "extinguished" and that its "ownership shall revert to the then owner of the interest out of which it was carved."[3] The statute, which became effective on September 2, 1971, contained a two-year grace period in which owners of mineral interests that were then unused and subject to lapse could preserve those interests by filing a claim in the recorder's office.[4]

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[1] The statute is entitled the Dormant Mineral Interests Act, and is more commonly known as the Mineral Lapse Act. Indiana Code §§ 32-5-11-1 thru 32-5-11-8 (1976), as added by Acts 1971, P. L. 423, § 1.

[2] —— Ind., at ——, 406 N. E. 2d, at 627.

The "use" of a mineral interest[5] that is sufficient to preclude its extinction includes the actual or attempted production of minerals, the payment of rents or royalties, and any payment of taxes;[6] a mineral owner may also protect his interest by filing a statement of claim with the local recorder of deeds.[7] The statute contains one exception to this general rule: if an owner of 10 or more interests in the same county files a statement of claim that inadvertently omits some of those interests, the omitted interests may be preserved by a supplemental filing made within 60 days of receiving actual notice of the lapse.[8]

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[3] "Any interest in coal, oil and gas, and other minerals, shall, if unused for a period of 20 years, be extinguished, unless a statement of claim is filed in accordance with section five hereof [sic], and the ownership shall revert to the then owner of the interest out of which it was carved." Ind. Code § 32-5-11-1 (1976).

[4] See n. 7, *infra.*

[5] As defined by the Act: "A mineral interest shall be taken to mean the interest which is created by an instrument transferring, either by grant, assignment, or reservation, or otherwise an interest, of any kind, in coal, oil and gas, and other minerals." Ind. Code § 32-5-11-2 (1976). The Indiana Supreme Court described the nature of this interest as follows:

> "Interests or estates in oil, gas, coal and other minerals lying beneath the surface of the land are interests in real estate for our purposes here, and as such are entitled beyond question to the firmest protection of the Constitution from irrational state action. They are vested property interests separate and distinct from the surface ownership. The State has no power to deprive an owner of such an interest without due process of law. They are entitled to the same protection as are fee simple titles. They are themselves of great utility and benefit to the society as a means of facilitating the development of natural resources." —— Ind., at ——, 406 N. E. 2d, at 627.

[6] "A mineral interest shall be deemed to be used when there are any minerals produced thereunder or when operations are being conducted thereon for injection, withdrawal, storage or disposal of water, gas or other fluid substances, or when rentals or royalties are being paid by the owner thereof for the purpose of delaying or enjoying the use or exercise of such rights or when any such use is being carried out on any tract with which such mineral interests may be unitized or pooled for production purposes,

The statute does not require that any specific notice be

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or when, in the case of coal or other solid minerals, there is production from a common vein or seam by the owners of such mineral interests, or when taxes are paid on such mineral interest by the owner thereof. Any use pursuant to or authorized by the instrument creating such mineral interest shall be effective to continue in force all rights granted by such instrument." Ind. Code § 32-5-11-3 (1976).

[7] "The statement of claim provided in section one above shall be filed by the owner of the mineral interest prior to the end of the twenty year period set forth in section two [sic] or within two years after the effective date of this act, whichever is later, and shall contain the name and address of the owner of such interest, and description of the land, on or under which such mineral interest is located. Such statement of claim shall be filed in the office of the Recorder of Deeds in the county in which such land is located. Upon the filing of the statement of claim within the time provided, it shall be deemed that such mineral interest was being used on the date the statement of claim was filed." Ind. Code § 32-5-11-4 (1976).

[8] "Failure to file a statement of claim within the time provided in section 4 shall not cause a mineral interest to be extinguished if the owner of such mineral interest:

"(1) was at the time of the expiration of the period provided in section four, the owner of ten or more mineral interests, as above defined, in the county in which such mineral interest is located, and;

"(2) made diligent effort to preserve all of such interests as were not being used, and did within a period of ten years prior to the expiration of the period provided in section 4 preserve other mineral interests, in said county, by the filing of statements of claim as herein required, and;

"(3) failed to preserve such interest through inadvertence, and;

"(4) filed the statement of claim herein required, within sixty (60) days after publication of notice as provided in section seven herein [sic], if such notice is published, and if no such notice is published, within sixty (60) days after receiving actual knowledge that such mineral interest had lapsed." Ind. Code § 32-5-11-5 (1976).

given to a mineral owner prior to a statutory lapse of a mineral estate. The Act does set forth a procedure, however, by which a surface owner who has succeeded to the ownership of a mineral estate pursuant to the statute may give notice that the mineral interest has lapsed.[9]

Two cases are consolidated in this appeal. The facts in each are stipulated. In No. 80-965, appellants include 11 parties who claim ownership of fractional mineral interests severed in 1942 and in 1944 from a 132-acre tract of land in Gibson County, Indiana; a twelfth appellant is the lessee of oil and gas leases executed in 1976 and 1977 by the other appellants. The appellee is the surface owner of the 132-acre tract from which the appellants' mineral interests were carved. The parties stipulated that the appellants had not used the mineral interests for 20 years and had not filed a statement of claim within two years of the effective date of the statute. Thus, under the terms of the Dormant Minerals Act, the mineral interests automatically lapsed on September 2, 1973, when the two-year grace period expired. On April 28, 1977, appellee gave notice that the mineral interests had lapsed.[10] Appellants responded by filing statements of claim in the Office of the Recorder of Gibson County. Thereafter, appellee filed this action, seeking a declaratory judgment that the rights of the mineral interest owners had lapsed and were extinguished by reason of the Dormant Mineral Interests Act.

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[9] "Any person who will succeed to the ownership of any mineral interest, upon the lapse thereof, may give notice of the lapse of such mineral interest by publishing the same in a newspaper of general circulation in the county in which such mineral interest is located, and, if the address of such mineral interest owner is shown of record or can be determined upon reasonable inquiry, by mailing within ten days after such publication a copy of such notice to the owner of such mineral interest. The notice shall state the name of the owner of such mineral interest, as shown of record, a description of the land, and the name of the person giving such notice. If a copy of such notice, together with an affidavit of service thereof, shall be promptly filed in the office of the recorder of deeds in the county wherein such land is located, the record thereof shall be prima facie evidence, in any legal proceedings, that such notice was given." Ind. Code § 32-5-11-6 (1976).

[10] Appellee published a "notice of lapse of mineral interest" in the Star Echo, a newspaper published at Owensville, Indiana. On May 6, 1977, ap-

In No. 80–1018, the severed mineral estate was created on March 1, 1954. On that date, appellants Pond and Bobe conveyed land to appellees by a warranty deed that contained a reservation of the mineral estate. On June 17, 1976, Pond and Bobe executed a coal mining lease with appellant Consolidated Coal Company. The parties stipulated that, for a 20-year period following the creation of the mineral estate, appellants did not use the interest or file a statement of claim in the recorder's office. Thus, on March 1, 1974, a date more than two years after the effective date of the Dormant Minerals Act, a statutory lapse occurred. On March 4, 1977, appellees gave notice of the lapse, both by letter to the appellants and by publication in the Princeton Daily Clarion. The parties jointly filed the instant lawsuit on January 12, 1978, to resolve their conflicting claims to the mineral rights.

In each case it is agreed that if the statute is valid, appellants' mineral interests have lapsed because of their failure to produce minerals, pay taxes, or file a statement of claim within the statutory period. In neither case does the agreed statement of facts indicate whether any of the appellants was aware of the enactment of the Mineral Lapse Act, or of its possible effect on his mineral interests, at any time after the enactment of the statute and before the appellees published notice of the lapse of the mineral estates.

At all stages of the proceedings, appellants challenged the constitutionality of the Dormant Mineral Interests Act. Appellants claimed that the lack of prior notice of the lapse of their mineral rights deprived them of property without due

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pellee mailed a similar notice to each of the appellants, except the oil and gas lessee.

process of law, that the statute effected a taking of private property for public use without just compensation, and that the exception contained in the Act for owners of ten or more mineral interests denied them the equal protection of the law; appellants based these arguments on the Fourteenth Amendment of the United States Constitution.[11] Appellants also contended that the statute constituted an impairment of contracts in violation of Article 1, Section 10, of the Constitution.[12] The state trial court held that the statute deprived appellants of property without due process of law, and effected a taking of property without just compensation.[13]

On appeal, the Indiana Supreme Court reversed. The court first explained the purpose of the Mineral Lapse Act:

> "The Act reflects the legislative belief that the existence of a mineral interest about which there has been no display of activity or interest by the owners thereof for a period of twenty years or more is mischievous and contrary to the economic interests and welfare of the public. The existence of such stale and abandoned interests creates uncertainties in titles and constitutes an impediment to the development of the mineral interests that

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[11] The Fourteenth Amendment provides, in part:

"No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U. S. Const., Amdt. 14, § 1.

The Fifth Amendment prohibition against the taking of private property for public use without just compensation applies against the States through the Fourteenth Amendment. *Webb's Fabulous Pharmacies, Inc.* v. *Beckwith*, 449 U. S. 155, 160.

[12] "No state shall . . . pass any bill of attainder, *ex post facto* law, or law impairing the obligations of contracts, or grant any title of nobility." U. S. Const., Art. 1, § 10.

[13] App. to Juris. Statement in No. 80–965, p. A–14; App. to Juris. Statement in No. 80–1018, p. A–16.

> may be present and to the development of the surface rights as well. The Act removes this impediment by returning the severed mineral estate to the surface rights owners. There is a decided public interest to be served when this occurs. The extinguishment of such an interest makes the entire productive potential of the property again available for human use." —— Ind., at ——, 406 N. E. 2d, at 627.

The court rejected the argument that a lapse of a vested mineral interest could not occur without affording the mineral owner prior notice and an opportunity to be heard. The court noted that "[p]rior to any extinguishment the owner of an interest will have had notice by reason of the enactment itself of the conditions which would give rise to an extinguishment and at a minimum a two-year opportunity to prevent those conditions from occurring by filing a statement of claim."[14] The Indiana Supreme Court also rejected the argument that the statute effected a taking without just compensation. The court reasoned that, like statutes of limitations, the Mineral Lapse Act was a permissible exercise of the police power of the State.[15] Finally, the court rejected the argument that the statute violated the Equal Protection Clause of the Fourteenth Amendment by providing a special exception for owners of ten or more interests who, through inadvertance, failed to preserve all such interests. The court again noted that the purpose of the statute was to encourage the development of mineral interests, and held that it was rational for the Indiana Legislature to provide special protection for owners of ten or more mineral interests since those owners are more likely to be able to engage in the actual production of mineral resources.[16]

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[14] —— Ind., at ——, 406 N. E. 2d, at 629. The court distinguished *Mullane* v. *Central Hanover Bank & Trust Co.*, 339 U. S. 306, and *Bell* v. *Burson*, 402 U. S. 535, which had been relied on by the trial court, on the ground that these cases set forth notice requirements for adjudicatory proceedings, and not for a self-executing statute that uniformly affected all parties within the State.

[15] "The purposes of this Act as stated above at the beginning of this opinion are to remedy uncertainties in titles and to facilitate the exploitation of energy sources and other valuable mineral resources. The dependence of local economies upon the mineral recovery industry and the entire State upon limited fossil fuel resources illustrates the public nature of these purposes. The objectives are valid and similar to those served by acts of limitation and the law of adverse possession. In limiting its incursion upon mineral rights to those which have been unused in the statutory sense for as long as twenty years, and in granting a two year period of grace after

I

Appellants raise several specific challenges to the constitutionality of the Mineral Lapse Act. Before addressing these

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the enactment of the statute to preserve interests, the Legislature adopted means which are rationally related to such objectives, and which themselves provide a reasonable time and a simple and inexpensive method, taking into consideration the nature of the case, for preserving such interests. We find that this is within the police power of the states and does not unconstitutionally impair the obligation of contracts." —— Ind., at ——, 406 N. E. 2d, at 630–631.

The court also rejected an argument that the statute effected a taking without compensation in violation of the State Constitution and state eminent domain theory, on the ground that the State did not acquire the mineral interests for its own use and benefit. The court emphasized that the Lapse Act does not "involve injury to private property through conduct or activities of governmental agents or others having and exercising the power of eminent domain"; rather, the statute declares that "a lapse of a mineral interest will occur in the event of specified conditions and circumstances." —— Ind., at ——, 406 N. E. 2d, at 631.

[16] Several state supreme courts, considering similar state statutes, have reached a result contrary to that of the Indiana Supreme Court. See *Wilson* v. *Bishop*, 82 Ill. 2d 364, 412 N. E. 2d 522 (1980); *Contos* v. *Herbst*, —— Minn. ——, 278 N. W. 2d 732, *app. dism'd sub. nom. Prest* v. *Herbst*, 444 U. S. 804 (1979); *Wheelock* v. *Heath*, 201 Neb. 835, 272 N. W. 2d 768 (1978); *Chicago & N. W. Transportation Co.* v. *Pedersen*, 80 Wis. 2d 566, 259 N. W. 2d 316 (1977). But see *Van Slouten* v. *Larsen*, 410 Mich. 21, 299 N. W. 2d 704 (1980).

arguments, however, it is appropriate to consider whether the State has the power to provide that property rights of this character shall be extinguished if their owners do not take the affirmative action required by the State.[17]

In *Board of Regents* v. *Roth*, 408 U. S. 564, 577, the Court stated:

> "Property interests, of course, are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law—rules or understandings that secure certain benefits and that support claims of entitlement to those benefits."

The State of Indiana has defined a severed mineral estate as a "vested property interest," entitled to "the same protection as are fee simple titles."[18] Through its Dormant Minerals Act, however, the State has declared that this property interest is of less than absolute duration; retention is conditioned on the performance of at least one of the actions required by the Act. We have no doubt that, just as a State may create a property interest that is entitled to constitutional protection, the State has the power to condition the permanent retention of that property right on the performance of reasonable conditions that indicate a present intention to retain the interest.

From an early time, this Court has recognized that States have the power to permit unused or abandoned interests in property to revert to another after the passage of time. In

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[17] Appellants do not specifically contend that the Lapse Act is an impermissible exercise of the legislative power of the State. Appellants argue, however, that the State has irrationally required extraction in 20 years of a resource that took "a millennia to create," Brief for Appellants in No. 80–965, p. 17, and has impermissibly transferred a fee interest in property from one private party to another. *Id.*, at 26.

[18] See n. 5, *supra*.

Hawkins v. *Barney's Lessee*, 30 Pet. 457, the Court upheld a Kentucky statute that prevented a landowner from recovering property on which the defendant had resided for more than seven years under a claim of right. The Court stated:

> "Such laws have frequently passed in review before this court; and occasions have occurred, in which they have been particularly noticed as laws not to be impeached on the ground of violating private right. What right has any one to complain, when a reasonable time has been given him, if he has not been vigilant in asserting his rights?" *Id.*, at 466.[19]

Similarly, in *Wilson* v. *Iseminger*, 185 U. S. 55, the Court upheld a Pennsylvania statute that provided for the extinguishment of a reserved interest in ground rent if the owner collected no rent and made no demand for payment for a period of 21 years.[20] Though the effect of the Pennsylvania statute was to extinguish a fee simple estate of permanent duration, the Court held that the legislation was valid.[21]

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[19] Much of what Justice Johnson wrote for the Court in that case is relevant today:

"It is argued, that limitation laws, although belonging to the lex fori, and applying immediately to the remedy, yet indirectly they effect a complete divesture and even transfer of right. This is unquestionably true, and yet in no wise fatal to the validity of this law. The right to appropriate a derelict is one of universal law, well known to the civil law, the common law, and to all law: it existed in a state of nature, and is only modified by society, according to the discretion of each community. What is the evidence of an individual having abandoned his rights or property? It is clear that the subject is one over which every community is at liberty to make a rule for itself. . . ." 30 Pet., at 467.

After observing that "the state of Kentucky has established the rule of seven years negligence to pursue a remedy," the Court noted that such a period was not unprecedented. The Court stated:

"In the early settlement of the country, the man who received a grant of land and failed, at first in three, and afterwards in five years, to seat and improve it, was held to have abandoned it: it received the denomination of lapsed land, was declared to be *forfeited* (Mercer's Abr.); and any one might take out a grant for it." *Id.*, at 467–468.

[20] The Court specifically noted that, as a matter of state law, the reserved

In these early cases, the Court often emphasized that the statutory "extinguishment" properly could be viewed as the withdrawal of a remedy rather than the destruction of a right.[22] We have subsequently made clear, however, that,

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interest in ground rent had the characteristics of a fee simple estate of permanent duration. The Court described the interest as follows:

"It is defined to be a rent reserved to himself and his heirs by the grantor of land, out of the land itself. It is not granted like an annuity or rent charge, but is reserved out of a conveyance of the land in fee. It is a separate estate from the ownership of the ground, and is held to be real estate, with the usual characteristics of an estate in fee simple, descendible, devisable, alienable." 185 U. S., at 59.

[21] The Court also held that the statute could apply to interests created before the enactment of the statute, since the statute contained a reasonable grace period in which owners could protect their rights.

"It may be properly conceded that all statutes of limitation must proceed on the idea that the party has full opportunity afforded him to try his right in the courts. A statute could not bar the existing rights of claimants without affording this opportunity; if it should attempt to do so, it would not be a statute of limitations, but an unlawful attempt to extinguish rights arbitrarily, whatever might be the purport of its provisions. It is essential that such statutes allow a reasonable time after they take effect for the commencement of suits upon existing causes of action; though what shall be considered a reasonable time must be settled by the judgment of the legislature, and the courts will not inquire into the wisdom of its decision in establishing the period of legal bar, unless the time allowed is manifestly so insufficient that the statute becomes a denial of justice." *Id.*, at 62–63.

The Court in *Iseminger* repeated the statement of Chief Justice Waite in *Terry* v. *Anderson*, 95 U. S. 628, 632–633, that "[t]his court has often decided that statutes of limitation affecting existing rights are not unconstitutional, if a reasonable time is given for the commencement of an action before the bar takes effect."

[22] In considering the validity of statutes such as those at issue in that case, the Court in *Iseminger* stated: "Such statutes, like those forbidding perpetuities and the statute of frauds, do not, in one sense, destroy the obligation of contracts as between parties thereto, but they remove the remedies which otherwise would be furnished by the courts." 185 U. S., at 61.

when the practical consequences of extinguishing a right are identical to the consequences of eliminating a remedy, the constitutional analysis is the same. *El Paso* v. *Simmons*, 379 U. S. 497, 506–507. The extinguishment of the property owners' "remedy" in *Hawkins* and *Iseminger* placed them in precisely the same position as that held by the mineral owners in the instant cases after their interests had lapsed.

The Indiana statute is similar in operation to a typical recording statute. Such statutes provide that a valid transfer of property may be defeated by a subsequent purported transfer if the earlier transfer is not properly recorded. In *Jackson* v. *Lamphire*, 3 Pet. 280, the Court upheld such a statute, even as retroactively applied to a deed that need not have been recorded at the time delivered. The Court stated:

> "It is within the undoubted power of state legislatures to pass recording acts, by which the elder grantee shall be postponed to a younger, if the prior deed is not recorded within the limited time; and the power is the same whether the deed is dated before or after the passage of the recording act. Though the effect of such a law is to render the prior deed fraudulent and void against a subsequent purchaser, it is not a law impairing the obligation of contracts; such too is the power to pass acts of limitations, and their effect. Reasons of sound policy have led to the general adoption of laws of both descriptions, and their validity cannot be questioned. The time and manner of their operation, the exceptions to them, and the acts from which the time limited shall begin to run, will generally depend on the sound discretion of the legislature, according to the nature of titles, the situation of the country, and the emergency which leads to their enactment." *Id.*, at 290.

These decisions clearly establish that the State of Indiana

See also *Terry* v. *Anderson*, 95 U. S. 628, 634.

has the power to enact the kind of legislation at issue. In each case, the Court upheld the power of the State to condition the retention of a property right upon the performance of an act within a limited period of time. In each instance, as a result of the failure of the property owner to perform the statutory condition, an interest in fee was deemed as a matter of law to be abandoned and to lapse.

It is also clear that the State has not exercised this power in an arbitrary manner. The Indiana statute provides that a severed mineral interest shall not terminate if its owner takes any one of three steps to establish his continuing interest in the property. If the owner engages in actual production, or collects rents or royalties from another person who does or proposes to do so, his interest is protected. If the owner pays taxes, no matter how small, the interest is secure. If the owner files a written statement of claim in the county recorder's office, the interest remains viable. Only if none of these actions is taken for a period of 20 years does a mineral interest lapse and revert to the surface owner.

Each of the actions required by the State to avoid an abandonment of a mineral estate furthers a legitimate state goal. Certainly the State may encourage owners of mineral interests to develop the potential of those interests; similarly, the fiscal interest in collecting property taxes is manifest. The requirement that a mineral owner file a public statement of claim furthers both of these goals by facilitating the identification and location of mineral owners, from whom developers may acquire operating rights and from whom the county may collect taxes. The State surely has the power to condition the ownership of property on compliance with conditions that impose such a slight burden on the owner while providing such clear benefits to the State.[23]

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[23] In *Miller* v. *Schoene*, 276 U. S. 272, the Court upheld the power of the State of Virginia to destroy ornamental cedar trees on private property that threatened the State's thriving apple industry. The Court stated:

II

Two of appellants' arguments may be answered quickly. Appellants contend that the Lapse Act takes private property without just compensation in violation of the Fourteenth Amendment; they also argue that the statute constitutes an impermissible impairment of contracts in violation of the Contracts Clause. The authorities already discussed mandate rejection of each of these arguments.

In ruling that private property may be deemed to be abandoned and to lapse upon the failure of its owner to take reasonable actions imposed by law, this Court has never required the State to compensate the owner for the consequences of his own neglect. We have concluded that the State may treat a mineral interest that has not been used for 20 years and for which no statement of claim has been filed as abandoned; it follows that, after abandonment, the former owner retains no interest for which he may claim compensation. It is the owner's failure to make any use of the property—and not the action of the State—that causes the lapse of the property right; there is no "taking" that requires compensation. The requirement that an owner of a property interest that has not been used for 20 years must come forward and file a current statement of claim is not itself a "taking."

Nor does the Mineral Lapse Act unconstitutionally impair the obligation of contracts. In the specific cases under review, the mineral owners did not execute the coal and oil

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"It will not do to say that the case is merely one of a conflict of two private interests and that the misfortune of apple growers may not be shifted to cedar owners by ordering the destruction of their property; for it is obvious that there may be, and that here there is, a preponderant public concern in the preservation of one interest over another. And where the public interest is involved preferment of that interest over the property interest of the individual, to the extent even of its destruction, is one of the distinguishing characteristics of every exercise of the police power which affects property." *Id.*, at 279–280 (citations omitted).

leases in question until after the statutory lapse of their mineral rights. The statute cannot be said to impair a contract that did not exist at the time of its enactment. Appellants' right to enter such an agreement of course has been impaired by the statute; this right, however, is a property right and not a contract right. In any event, a mineral owner may safeguard any contractual obligations or rights by filing a statement of claim in the county recorder's office. Such a minimal "burden" on contractual obligations is not beyond the scope of permissible state action.[24]

III

Appellants' primary attack on the Dormant Minerals Act is that it extinguished their property rights without adequate notice. In advancing this argument, appellants actually assert two quite different claims. First, appellants argue that the State of Indiana did not adequately notify them of the legal requirements of the new statute. Second, appellants argue that a mineral interest may not be extinguished unless the surface owner gives the mineral owner advance notice that the 20-year period of nonuse is about to expire. When these two arguments are considered separately, it is clear that neither has merit.

A

The first question raised is simply how a legislature must go about advising its citizens of actions that must be taken to avoid a valid rule of law that a mineral interest that has not been used for 20 years will be deemed to be abandoned. The answer to this question is no different from that posed for any legislative enactment affecting substantial rights. Generally, a legislature need do nothing more than enact and publish the law, and afford the citizenry a reasonable opportunity to familiarize itself with its terms and to comply. In this case, the two-year grace period included in the Indiana statute forecloses any argument that the statute is invalid because mineral owners may not have had an opportunity to become familiar with its terms. It is well established that persons owning property within a State are charged with knowledge of relevant statutory provisions affecting the control or disposition of such property.[25]

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[24] See *Home Building & Loan Assn.* v. *Blaisdell*, 290 U. S. 398; *El Paso* v. *Simmons*, 379 U. S. 497.

It is also settled that the question whether a statutory grace period provides an adequate opportunity for citizens to become familiar with a new law is a matter on which the Court shows the greatest deference to the judgment of state legislatures. See *Jackson* v. *Lamphire*, 3 Pet. 280, 290; *Wilson* v. *Iseminger*, 185 U. S. 55, 62–63. A legislative body is in a far better position than a court to form a correct judgment concerning the number of persons affected by a change in the law, the means by which information concerning the law is disseminated in the community, and the likelihood that innocent persons may be harmed by the failure to receive adequate notice.[26]

In short, both the Indiana Legislature and the Indiana Supreme Court have concluded that a two-year period was sufficient to allow property owners in the State to familiarize themselves with the terms of the statute and to take any action deemed appropriate to protect existing interests. On the basis of the records in these two proceedings, we cannot conclude that the statute was so unprecedented and so unlikely to come to the attention of citizens reasonably attentive to the enactment of laws affecting their rights that this two-year period was constitutionally inadequate. We refuse to displace hastily the judgment of the Legislature and to conclude that a legitimate exercise of state legislative power is invalid because citizens might not have been aware of the requirements of the law.[27]

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[25] As stated in *North Laramie Land Co.* v. *Hoffman*, 268 U. S. 276, 283:

> "All persons are charged with knowledge of the provisions of statutes and must take note of the procedure adopted by them; and when that procedure is not unreasonable or arbitrary there are no constitutional limitations relieving them from conforming to it. This is especially the case with respect to those statutes relating to the taxation or condemnation of land. Such statutes are universally in force and are general in their application, facts of which the land owner must take account in providing for the management of his property and safeguarding his interest in it."

See also *Anderson National Bank* v. *Luckett*, 321 U. S. 233, 243.

[26] Moreover, the adequacy of the two-year grace period for Indiana property owners can be evaluated more reliably by the Indiana Supreme Court than by this Court.

B

We have concluded that appellants may be presumed to have had knowledge of the terms of the Dormant Minerals Act. Specifically, they are presumed to have known that an unused mineral interest would lapse unless they filed a statement of claim. The question then presented is whether, given that knowledge, appellants had a constitutional right to be advised—presumably by the surface owner—that his 20-year period of nonuse was about to expire.

In answering this question, it is essential to recognize the difference between the self-executing feature of the statute and a subsequent judicial determination that a particular lapse did in fact occur. As noted by appellants, no specific notice need be given of an impending lapse. If there has been a statutory use of the interest during the preceding 20-year period, however, by definition there is no lapse—whether or not the surface owner, or any other party, is aware of that use. Thus, no mineral estate that has been protected by any of the means set forth in the statute may be lost through lack of notice. It is undisputed that, before judgment could be entered in a quiet title action that would determine conclusively that a mineral interest has reverted to the surface owner, the full procedural protections of the Due Process Clause—including notice reasonably calculated to reach all interested parties and a prior opportunity to be heard—must be provided.

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[27] For these reasons, we reject the suggestion in the dissenting opinion that the Indiana statute is invalid because it does not adequately protect citizens from "the silent actions of the legislature." *Post*, at 10–11. This proposition is squarely at odds with the established principle that "[a]ll persons having property located within a state and subject to its dominion must take note of its statutes affecting the control or disposition of such property and of the procedure which they set up for those purposes." *Anderson National Bank* v. *Luckett*, 321 U. S. 233, 243; see n. 25, *supra*. Additional publication of the provisions of the Act—which the dissent admits would be constitutionally sufficient, see *post*, at 4 n. 2—was not constitutionally required.

Appellants place primary reliance on our decision in *Mullane* v. *Central Hanover Bank & Trust Co.*, 339 U. S. 306. In that case the Court considered the constitutional sufficiency of notice given to the beneficiaries of a common trust fund of a judicial settlement of accounts by the trustee of the fund. The Court held that the notice by publication authorized by the relevant New York statute was not sufficient, since it was not reasonably calculated to apprise the beneficiaries of the pendency of the judicial proceeding. Justice Jackson, writing for the Court, stated:

> "Many controversies have raged about the cryptic and abstract words of the Due Process Clause but there can be no doubt that at a minimum they require that deprivation of life, liberty or property by adjudication be preceded by notice and opportunity for hearing appropriate to the nature of the case." *Id.*, at 313.

Specifically, the Court held that "[a]n elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections," *id.*, at 314; the notice in *Mullane* was deficient "not because in fact it fail[ed] to reach everyone, but because under the circumstances it [was] not reasonably calculated to reach those who could easily be informed by other means at hand." *Id.*, at 319.

The reasoning in *Mullane* is applicable to a judicial proceeding brought to determine whether a lapse of a mineral estate did or did not occur, but not to the self-executing feature of the Mineral Lapse Act. The due process standards of *Mullane* apply to an "adjudication" that is "to be accorded finality." The Court in *Mullane* itself distinguished the situation in which a State enacted a general rule of law governing the abandonment of property.[28] It has long been established

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[28] "The ways of an owner with tangible property are such that he usually arranges means to learn of any direct attack upon his possessory or proprietary rights. Hence, libel of a ship, attachment of a chattel or entry upon real estate in the name of law may reasonably be expected to come promptly to the owner's attention. When the state within which the owner has located such property seizes it for some reason, publication or posting affords an additional measure of notification. A state may indulge the assumption that one who has left tangible property in the state either had abandoned it, in which case proceedings against it deprive him of nothing, *cf. Anderson National Bank* v. *Luckett*, 321 U. S. 233; *Security Savings Bank* v. *California*, 263 U. S. 282, or that he has left some caretaker under a duty to let him know that it is being jeopardized. *Ballard* v. *Hunter*, 204 U. S. 241; *Huling* v. *Kaw Valley R. Co.*, 130 U. S. 559. As phrased long ago by Chief Justice Marshall in *The Mary*, 9 Cranch 126, 144, 'It is the part of common prudence for all those who have any interest in [a thing], to guard that interest by persons who are in a situation to protect it.'" 339 U. S., at 316.

The Court in *Mullane* emphasized that: "In the case before us there is, of course, no abandonment." *Ibid.*

The dissent attempts to distinguish *Mullane* on the ground that, unlike the tangible interests that the Court in that case stated could be subject to an assumption of abandonment, the present case concerns "incorporeal interests" that have not been "directly attacked, seized, possessed, used, or depleted." *Post*, at 10. We do not believe, however, that the State's assumption of abandonment in this case is improper. As the Indiana Supreme Court described, interests or estates in oil, gas, coal and other minerals lying beneath the surface of the land are "interests in real estate," —— Ind., at ——, 406 N. E. 2d, at 627; oil, gas, coal and other minerals are tangible interests that may be used and developed by a mineral owner. Moreover, the length of the period that is afforded to a mineral owner to that "laws [must] give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly," *Grayned* v. *City of Rockford*, 408 U. S. 104, 108, but it has never been suggested that each citizen must in some way be given specific notice of the impact of a new statute on his property before that law may affect his property rights.

As emphasized above, appellants do not challenge the sufficiency of the notice that must be given prior to an adjudication purporting to determine that a mineral interest has not been used for 20 years. Appellants simply claim that the absence of specific notice prior to the lapse of a mineral right renders ineffective the self-executing feature of the Indiana statute. That claim has no greater force than a claim that a self-executing statute of limitations is unconstitutional. The Due Process Clause does not require a defendant to notify a potential plaintiff that a statute of limitations is about to run, although it certainly would preclude him from obtaining a declaratory judgment that his adversary's claim is barred without giving notice of that proceeding.

Appellants also rely on a series of cases that have required specific notice and an opportunity to be heard before a driver's license is suspended for failure to post security after an accident,[29] before property is seized pursuant to a prejudgment replevin order,[30] or before service is terminated by a

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use the interest, the variety and minimal extent of the actions that constitute a statutory use, and the length of the statutory grace period are sufficient to entitle the State to indulge in the assumption that—if no statutory use is made in a 20-year period and no statement of claim is filed in the two-year grace period, if applicable—the mineral owner has abandoned the property. We need not decide today whether the State may indulge in a similar assumption in cases in which the statutory period of nonuse is shorter than that involved here, or in which the interest affected is such that concepts of "use" or "nonuse" have little meaning.

[29] *Bell* v. *Burson*, 402 U. S. 535.

[30] *Fuentes* v. *Shevin*, 407 U. S. 67.

public utility for failure to tender payment of amounts due.[31] In each of those cases, however, the property interest was taken only after a specific determination that the deprivation was proper.[32] In the instant case, the State of Indiana has enacted a rule of law uniformly affecting all citizens that establishes the circumstances in which a property interest will lapse through the inaction of its owner. None of the cases cited by appellants suggests that an individual must be given advance notice before such a rule of law may operate.[33]

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[31] *Memphis Light, Gas & Water Div.* v. *Craft*, 436 U. S. 1.

[32] The nature of the State determination in *Fuentes* and *Craft* is clear. While less so in *Bell*, the Court specifically noted in that case:

"The main thrust of Georgia's argument is that it need not provide a hearing on liability because fault and liability are irrelevant to the statutory scheme. We may assume that were this so, the prior administrative hearing presently provided by the State would be 'appropriate to the nature of the case.' *Mullane* v. *Central Hanover Bank & Trust Co.*, 339 U. S. 306, 313 (1950). But '[i]n reviewing state action in this area . . . we look to substance, not to bare form, to determine whether constitutional minimums have been honored.' *Willner* v. *Committee on Character*, 373 U. S. 96, 106–107 (1963)(concurring opinion). And looking to the nature of the State's statutory scheme, it is clear that liability, *in the sense of an ultimate judicial determination of responsibility*, plays a crucial role in the Safety Responsibility Act." 402 U. S., at 541 (emphasis supplied).

[33] The dissenting opinion places almost exclusive reliance on broad language in *Lambert* v. *California*, 355 U. S. 225. As the dissent itself admits, however, see *post*, at 8 n. 5, *Lambert* does not control the disposition of this case. The Court in *Lambert* considered the validity of an ordinance that made it a criminal offense for a convicted felon to remain in the City of Los Angeles for five days without registering with the Chief of Police. The Court held:

"We believe that actual knowledge of the duty to register or proof of the probability of such knowledge and subsequent failure to comply are necessary before a conviction under the ordinance can stand. As Holmes wrote in The Common Law, 'A law which punished conduct which would not be blameworthy in the average member of the community would be too severe for that community to bear.'" 355 U. S., at 229.

Lambert concerns the *mens rea* that is necessary before the State may convict an individual of crime. See *United States* v. *Freed*, 401 U. S. 601;

We have held that the State may impose on an owner of a mineral interest the burden of using that interest or filing a current statement of claim. We think it follows inexorably that the State may impose on him the lesser burden of keeping informed of the use or nonuse of his own property. We discern no procedural defect in this statute.[34]

IV

The Indiana statute allows a mineral owner to retain an interest, notwithstanding a failure to file a statement of claim within the statutory period, if he satisfies four specific conditions: (1) he must own at least ten mineral interests in the

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United States v. *International Minerals & Chemical Corp.*, 402 U. S. 558. Its application has been limited, lending some credence to Justice Frankfurter's colorful prediction in dissent that the case would stand as "an isolated deviation from the strong current of precedents—a derelict on the waters of the law." 355 U. S., at 232.

[34] The dissenting opinion suggests that as a practical matter notice must precede any attempt to develop a lapsed mineral estate, see *post*, at 15–16, and that there is thus no reason not to require notice in advance of the lapse itself. This suggestion ignores the fact that, independent of the interest in facilitating the development of mineral rights, the State has an interest in eliminating fractured mineral estates that were created long ago, have been unused for the statutory period, and create uncertainties in title records. As stated by the Indiana Supreme Court, "[t]he purposes of this Act . . . are to remedy uncertainties in titles and to facilitate the exploitation of energy sources and other valuable mineral resources." —— Ind., at ——, 406 N. E. 2d, at 630. The State legitimately may treat a mineral interest that has been unused for the statutory period and for which the owner has not bothered to file a statement of claim as worthless and abandoned; the State has an interest in eliminating such encumbrances from title records. Moreover, if a mineral interest has been inactive for a sufficient period of time, a developer may well decide that notice is entirely unnecessary. Title opinions and title insurance, based normally on a thorough search of county records, may be sufficient to assure a potential developer that an ancient and dormant mineral estate, like other possible clouds on title, is without legal significance. In any event, the question in this case is whether additional notice is constitutionally required, and not whether such notice might better serve the purposes of the statute.

county; (2) he must have made a diligent effort to preserve all his interests and have succeeded in preserving some; (3) his failure to preserve the interest in question must have been through "inadvertence"; and (4) he must file a statement of claim within 60 days after receiving notice that the mineral interest has lapsed.[35] Appellants contend that this special exception violates the Equal Protection Clause of the Fourteenth Amendment.

There is nothing in the records to tell us how often, if ever, this statutory exception has been invoked. Nor do the records indicate the number of persons who own ten or more interests in any one county in Indiana. Since mineral interests may be bought and sold like other property, and often have little value, the composition of the class benefitted by this exception is subject to constant change. Unlike those classes that are defined by personal characteristics, anyone who purchases ten fractional mineral interests in the same county, of whatever value, can join this favored class.

Although appellants do not suggest that they are financially unable to join the special class, or that its existence has any adverse impact on their own rights—or indeed that excision of the exception from the Act would provide them with any benefit whatsoever—they nevertheless argue that it is basically unfair to treat owners of multiple interests more favorably than they are treated. The Indiana Supreme Court has explained, however, that the State has an interest in encouraging the assembly of multiple interests in a single ownership because such owners are more likely to be able to engage in the actual production of mineral resources.[36] This state interest is unquestionably legitimate. Thus, a statutory provision that encourages multiple ownership—by giving that kind of ownership additional protection against forfeiture after it has been assembled—is related to the central purpose of the statute. Since the exception furthers a legitimate statutory purpose, and has no adverse impact on persons like the appellants who own fewer mineral interests, the exception does not violate the Equal Protection Clause of the Fourteenth Amendment.

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[35] See n. 8, *supra.*

[36] "Minerals exist within the earth in strata and formations which do not necessarily coincide with the manner in which man has chosen to divide the surface area. Consequently it is commonly necessary to assemble several mineral interests in order to render the extraction of minerals safe and profitable. The Legislature could reasonably have concluded that those meeting the criteria set forth above include those most likely to assemble

The judgment of the Supreme Court of Indiana is affirmed.

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such interests and actually produce minerals. The separate classification of interests so held within these essential clusters is rationally related to the legitimate objectives of the enactment and is consequently not contrary to the requirements of state and federal equal protection." —— Ind., at ——, 406 N. E. 2d, at 631–632.

SUPREME COURT OF THE UNITED STATES

Nos. 80–965 and 80–1018

TEXACO, INC., et al., APPELLANTS
80–965 *v.*
LOUISE F. SHORT, et al.

EDEN H. POND, EDNA H. BOBE and CONSOLIDATION COAL COMPANY, APPELLANTS
80–1018 *v.*
ULYSSES G. WALDEN, JR., et al.

ON APPEALS FROM THE SUPREME COURT OF INDIANA

[January 12, 1982]

Justice Brennan, with whom Justice White, Justice Marshall, and Justice Powell join, dissenting.

There is no measurable dispute in this case concerning Indiana's power to control, define, and limit interests in land within its boundaries. Nor is there any question that Indiana has a legitimate interest in encouraging the productive use of land by establishing a registration system to identify the owners of mineral rights. Nor indeed is there any question that extinguishment of a mineral owner's rights may be an appropriate sanction for a failure to register. The question presented here is simply whether the State of Indiana has deprived these appellants of due process of law by extinguishing their pre-existing property interests without regard to whether they knew, and without providing any meaningful mechanism by which they might have learned, of the imminent taking of their property or their obligations under the law.

I

The State of Indiana has historically afforded owners of incorporeal interests in minerals all the protections and privileges enjoyed by any owner of an estate in land held in fee simple. The mineral interests of the appellants here were thus assuredly within the scope of the dual constitutional guarantees that there be no taking of property without just compensation, and no deprivation of property without the due process of law. By the statute at issue in this case, Indiana has imposed upon the owners of mineral interests the requirement that they pay taxes, or put their interest to productive use, or make their identity known by filing a statement of claim every 20 years. If the mineral interest owner fails to comply with these conditions, his interest is extinguished, and the mineral rights in the land are, by operation of law, merged with the surface estate, to the benefit of the surface owner.[1]

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[1] Ind. Code § 32–5–11–1 (1976) provides that:

"Any interest in coal, oil, and gas, and other minerals, shall, if unused for a period of 20 years, be extinguished, unless a statement of claim is filed in accordance with section five [32–5–11–5] [*sic*] hereof, and the ownership shall revert to the then owner of the interest out of which it was carved."

A mineral interest is deemed "used" for the purposes of the statute

"when there are minerals produced thereunder or when operations are conducted thereon for injection, withdrawal, storage or disposal of water, gas or other fluid substances, or when rentals or royalties are being paid by the owner thereof for the purpose of delaying or enjoying the use or exercise of such rights or when any such use is being carried out on any tract with which such mineral interest may be unitized or pooled for production purposes, or when, in the case of coal or other solid minerals, there is production from a common vein or seam by the owners of such mineral interests, or when taxes are paid on such mineral interest by the owner thereof. Any use pursuant to or authorized by the interest creating such mineral interest shall be effective to continue in force all rights granted by such instrument." Ind. Code § 32–5–11–3.

With respect to the statement of claim, the statute specifies the relevant time limits:

"The statement of claim provided in section one above [32–5–11–1] shall be filed by the owner of the mineral interest prior to the end of the twenty

As to one class of mineral interest owners, there is no question that the statute is a constitutionally proper exercise of the State's power. Every mineral interest in land carved from the fee after the effective date of the statute, was carved subject to the statute's limitations. In *prospective* application the statute simply provides that any instrument purporting to transfer a mineral interest carries with it the implicit condition that unless the transferee uses the land within the meaning of the statute, his interest will revert to the transferor. It is only where the State seeks to to change the fundamental nature of a property interest already in the hands of its owner that the operative restrictions of both the Takings Clause and the Due Process Clause come into play.

If Indiana were by simple fiat to "extinguish" all pre-existing mineral interests in the State, or to transfer those interests to itself, to surface owners, or indeed to anyone at all, that action would surely be unconstitutional and unenforceable—at least absent just compensation. That is not the case here for, as the Court points out, *ante* at 13, 15, the State has offered the owner of a mineral interest several options by which he may preserve his interest, and a grace period in which he may do so. Because the State has provided these options, the Court concludes that there has been no unconstitutional deprivation of property: "It is the owner's failure to make any use of the property—and not the action of

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"The statement of claim provided in section one above [32–5–11–1] shall be filed by the owner of the mineral interest prior to the end of the twenty year period set forth in section two [one] [32–5–11–1] or within two years after the effective date [September 2, 1971] of this act, whichever is later, and shall contain the name and address of the owner of such interest, and description of the land, on or under which such mineral interest is located. Such statement of claim shall be filed in the office of the recorder of deeds in the county in which such land is located. Upon the filing of the statement of claim within the time provided, it shall be deemed that such mineral interest was being used on the date the statement of claim was filed." Ind. Code § 32–5–11–4.

the State—that causes the lapse of the property right . . . ." *Ante* at 14. The Court disdains any serious consideration of whether the saving options afforded by the State are in any meaningful way within the reach of the mineral interest owners.[2] In this respect the Court errs, for the Due Process

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[2] In an attempt to support its refusal seriously to inquire into the adequacy of the protections afforded mineral interest owners by which they might preserve their property, the Court analogizes the Indiana statute to a recording act and draws on the pre-Fourteenth Amendment case of *Jackson* v. *Lamphire*, 3 Pet. 280 (1830). *Ante*, at 12, 16. The Court's reliance is misplaced. In *Jackson* v. *Lamphire, supra*, we recognized that the manner of implementing a recording act is to be left to the discretion of the legislature in the first instance. But we also recognized the natural limits of that legislative authority.

"The time and manner of their operation, the exceptions to them, and the acts from which the time limited shall begin to run, will generally depend on the sound discretion of the legislature, according to the nature of the titles, the situation of the country, and the emergency which leads to their enactment. *Cases may occur where the provisions of a law on those subjects may be so unreasonable as to amount to a denial of a right, and call for the interposition of the court; but the present is not one.*" *Id.*, at 290 (emphasis added).

It is not at all surprising that we did not find the exercise of legislative authority in *Jackson* v. *Lamphire* unreasonable. In 1797, the New York legislature established a Commission to settle competing claims to land within a particular county. The New York Act provided a two year period, following the action of the Commission, in which any party adversely affected might dissent and preserve his right to recover his title. *Id.*, at 282–283. In addition, before the Commission could act, *the New York legislation required precisely those forms of notice that petitioners in these cases complain are lacking in the Indiana statute.* The Commission was expressly charged with the responsibility of notifying the populace that it was convening to resolve disputes concerning land within the county. *Id.*, at 283. The New York Act further provided that

"in all cases where there are filed or recorded . . . two or more deeds from one and the same person, or in the same right to different persons, *if any person interested under either of them shall neglect to make his claim, and in all cases where several persons appear to have claims to one and the same piece of land, and any of them do not appear before the said commis-*

Clause of the Fourteenth Amendment requires the Court to make precisely the inquiry the Court avoids. As we have noted:

> "It does not follow that what [a State] can legislate prospectively it can legislate retrospectively. The retrospective aspects of legislation, as well as the prospective aspects, must meet the test of due process, and the justifications for the latter may not suffice for the former." *Usery* v. *Turner Elkhorn Mining Co.*, 428 U. S. 1, 16–17 (1976).

There is much to be said for the maxim upon which the Court places its principal reliance in upholding the restrospective application of this statute: that each citizen may be charged with knowledge of the law.[3] The justifica-

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sioners, they shall cause a notice to be published in the newspapers aforesaid, and continued for six weeks, requiring all persons interested in such land to appear at a certain time and place therein mentioned, not less than six months from the date of such notice, and exhibit their claims to the same land." Id., at 284 (emphasis added).

If the Indiana statute at issue in these cases provided a two-year period in which mineral interest owners could assert their interests, *following* notice by publication, as provided in New York Act at issue in *Jackson* v. *Lamphire*, I would readily agree that the Indiana statute was reasonable even as applied to existing mineral interests. Absent such notice, the two-year grace period provided by Indiana is constitutionally meaningless.

[3] Despite suggestive references to cases involving abandonment of property, *ante* at 9–11, the Court does not rest on the argument that failure to comply with the provisions of the Indiana statute implies abandonment. Nor could the Court so rest. The very cases cited by the Court demonstrate that the finding of abandonment with respect to rights in land has historically been associated with the property owner's failure to pursue legal remedies over the course of some legislatively established period of time. See *Wilson* v. *Iseminger*, 185 U. S. 55 (1902); *Hawkins* v. *Barney's Lessee*, 5 Pet. 457, 466–467 (1831). The mineral interest owners in these cases plainly have not been derelict in pressing their rights. Until their interests were extinguished "by operation of law" they simply had no occasion to pursue any legal action. Moreover, that mineral interest owners

tion for that rule is its necessity. As a practical matter, a State cannot afford notice to every person who is or may be affected by a change in the law. But an unfair and irrational exercise of state power cannot be transformed into a rational exercise merely by invoking a legal maxim or presumption. If it is to survive the scrutiny that the Constitution requires us to afford laws that deprive persons of substantial interests in property, an enactment that relies on that presumption of knowledge must evidence some rational accomodation between the interests of the State and fairness to those against whom the law is applied. Cf. *Vlandis* v. *Kline*, 412 U. S. 441 (1973). By acknowledging that there is some limit to the exercise of legislative power to transform the interests of persons in property, we do not depart from the principle of utmost deference to the judgment of the legislature to reach those accomodations in the first instance. But the Constitution puts even our most cherished legal maxims and presumptions to the test of fairness and rationality in light of common experience. "[I]n passing on the constitutionality of a state law, its effect must be judged in the light of its practical application to the affairs of men as they are ordinarily conducted." *North Laramie Land Co.* v. *Hoffman*, 268 U. S. 276, 283 (1925).

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may have failed to exploit their interest for twenty years, during which period it may not have been economically feasible to extract minerals from the property, and during which period there was no statutory obligation to use the interest in any mannner, does not suggest abandonment. Compare *Provident Savings Institution* v. *Malone*, 221 U. S. 660, 664 (1911). Nor can the intent to abandon, or any independent state interest supporting the Indiana statute, be found in appellants' failure to pay taxes. At no time have taxes been separately assessed with respect to the reserved mineral interest in No. 80–1018. App. 7. While the record is slightly more ambiguous with respect to No. 80–965, appellees conceded at oral argument that the counties of Indiana generally do not assess taxes on mineral interests that are neither in use nor in the process of development. Tr. of Oral Arg. 25.

Thus, we have recognized certain very limited circumstances in which a State's reliance on the maxim that a man may be presumed to know the law is not consistent with the restrictions imposed by the Constitution on legislative action. In *Lambert* v. *California*, 355 U. S. 225 (1957), a municipal ordinance made it an offense for any convicted felon to remain in the City of Los Angeles for more than five days without registering with the police. We held that the ordinance, which purported to deprive a person of liberty for failing to register, could not be applied to a person who neither knew, nor could reasonably have been expected to know, of his legal obligation. As we noted:

> "[W]e deal here with conduct that is wholly passive—mere failure to register. It is unlike the commission of acts, or the failure to act under circumstances that should alert the doer to the consequences of his deed. The rule that ignorance of the law will not excuse is deep in our law, as is the principle that of all the powers of local government, the police power is 'one of the least limitable.' On the other hand, due process places some limits on its exercise. Engrained in our concept of due process is the requirement of notice. Notice is sometimes essential so that the citizen has the chance to defend charges. *Notice is required before property interests are disturbed*, before assessments are made, before penalties are assessed. *Notice is required in a myriad of situations where a penalty or forfeiture might be suffered for mere failure to act*. . . .
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> "Registration laws are common and their range is wide. Many such laws are akin to licensing statutes in that they pertain to the regulation of business activities. But the present ordinance is entirely different. *Violation of its provisions is unaccompanied by any activity whatever*, mere presence in the city being the test. Moreover, *circumstances which might move one to in-*

> *quire as to the necessity of registration are completely lacking. . . . [T]his appellant on first becoming aware of her duty to register was given no opportunity to comply with the law and avoid its penalty, even though her default was entirely innocent.*" *Id.*, at 228–229 (emphasis added) (citations omitted).

There is, of course, no general requirement that a State take affirmative steps to inform its citizenry of their obligations under a particular statute before imposing legal sanctions for violation of that statute. *Lambert* suggests no such general requirement. Rather, that case highlights the limited circumstances in which the State's reliance on a presumption of knowledge strains the constitutional requirement that the liberty and property of persons be dealt with fairly and rationally by the State. The State's power to impose sanctions on individuals is to be tested in part against the rationality of the proposition that those individuals were or could have been aware of their legal obligations. The present case, like *Lambert*, involves the necessity of notice in the context of a registration statute sufficiently unusual in character, and triggered in circumstances so commonplace, that an average citizen would have no reason to regard the triggering event as calling for a heightened awareness of one's legal obligations.[4]

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[4] Because *Lambert* involved the imposition of *criminal sanctions*, giving rise to a rigor in the application of due process standards that would be inappropriate where only interests in property are at stake, it cannot control the disposition here. But the rigor with which the due process test was applied in *Lambert* is worth noting. The State's interest in that case lay in identifying felons within its boundaries. The statute failed for want of notice. But it is difficult to conceive how the State might have contrived a statute, effecting the same purpose, short of informing every person who entered the State that if he was a convicted felon he was obliged to register with the police. Because it was the singular purpose of the State to identify felons, individualized notice was simply incompatible with the legislative purpose. Nevertheless, we held the ordinance unenforceable.

The opinion of the Court suggests that the presumption of knowledge of the law is not unreasonable in a case such as this because it is a customary feature of property ownership that the landowner monitor the acts of the legislature that may affect his interest. *Ante*, at 16. The Court would appear to treat property owners as businessmen, of whom we do indeed expect the greatest attentiveness to regulatory obligations in the conduct of their business affairs. But neither our cases nor our experience supports the Court's supposition about the diligence reasonably expected of property owners. Property owners have historically been allowed to rest easy in the knowledge that their holding is secure, absent some affirmative indication to the contrary; to rely on the general practice that, "Notice is required before property interests are disturbed, before assessments are made, before penalties are assessed. Notice is required in a myriad of situations where a penalty or forfeiture might be suffered for mere failure to act." *Lambert* v. *California*, 355 U. S., at 228. Surely no contrary understanding of the obligations of property ownership could be attributed to the mineral interest owners of Indiana. It was their historic complacency, heretofore undisturbed by statutory obligation, that prompted the State of Indiana to install the regulatory regime at issue here.

The Constitution does, of course, permit the interests of a property owner to be adversely affected upon notice less exacting than those mechanisms of notification deemed minimally acceptable in other contexts. But the rationale for this standard of "lesser notice" with respect to matters involving land bears restating for the contrast that it presents with the circumstances of this case:

"[P]ublication traditionally has been acceptable as notifi-

As will be noted below, the requirement of prior notice with respect to the registration scheme at issue in these cases, does not limit the ability of the state to further its asserted objectives. See *infra*, at 13–16.

> cation *supplemental* to other action which in itself may be reasonably expected to convey a warning. The ways of an owner with *tangible property* are such that he usually arranges means to learn of any *direct attack* on his personal or proprietary rights. Hence, libel of a ship, attachment of a chattel or entry upon real estate in the name of the law may reasonably be expected to come promptly to the owner's attention. When the state within which the owner has located such property seizes it for some reason, publication or posting affords an additional measure of notification. A state may indulge the assumption that one who has left *tangible* property in the state either has abandoned it, in which case the proceedings against it deprive him of nothing, or that he has left some caretaker under a duty to let him know that it is being jeopardized." *Mullane* v. *Central Hanover Bank*, 339 U. S. 306, 316 (1950)(emphasis added; citations omittted).

It may be reasonable to expect property owners to maintain sufficient awareness of their property to mark those situations in which the property is physically disturbed with some scrutiny of their duties and obligations under the law. The owners of the incorporeal interests at issue here are hardly in a similar situation. There is no event or circumstance to which they might have turned their powers of observation; nothing has been directly attacked, seized, possessed, used, or depleted. The only "caretaker" who could have guarded the interest of appellants from the silent actions of the legislature and the surface owner, is a caretaker charged with the responsibility of daily surveillance over happenings in the state legislature. In light of "the affairs of men as they are ordinarily conducted," a State may not constitutionally attribute to each citizen the foresight, or the continuing duty, to maintain a lobbyist in the state capital in order to guard his property from extinguishment.

The Court also relies on cases involving the application of legislatively foreshortened limitations periods to causes of actions that have already vested. *Ante*, at 16. But those cases illustrate, rather than refute, the constitutional principle that reliance on the maxim of presumed knowledge of the law is limited by the reasonableness of applying that maxim in a particular class of cases. The Court has upheld retroactive adjustments to a limitations period only when the legislature has provided a grace period during which the potential plaintiff could reasonably be expected to learn of the change in the law and then initiate his action. In the context of a retrospective statute of limitations, a reasonable grace period provides an adequate guarantee of fairness. Having suffered the triggering event of an injury, a potential plaintiff is likely to possess a heightened alertness to the possibly changing requirements of the law bearing on his claim. Because redress necessarily depends on recourse to the State's judicial system, the State is free to condition its intervention on rules of procedure, and further, to impose on the potential plaintiff the obligation to monitor changes in those rules. Plaintiffs, and their attorneys, are so aware.

The situation of appellants here is not at all similar. The statute does not operate upon the dormant mineral interest owner after he has suffered some direct affront to his property such that he might reasonably be called upon to increase his awareness of his legal obligations. The mineral interest owner has not been derelict in pressing rights against third parties such that the State may reasonably assume he has abandoned his interest. The mineral interest owner has no reason to anticipate an occassion for state assistance, and thus no reason to monitor the groundrules upon which the State conditions its aid. In this case the State has taken the initiative in seeking to regulate heretofore unregulated incorporeal interests in land under circumstances in which a need for heightened attentiveness to the law cannot reasonably be apprehended by the mineral interest owner. In these circumstances, the empirical foundation of the assertion that passage of a statute will create knowledge of its provisions is at its weakest.

This does not end the inquiry, for the State may have an identifiable interest in not making provision for notice in a particular circumstance. If there were such an interest, the Constitution would not lightly supplant the legislative judgment. I thus turn to the asserted interests of the State in the procedure established here.

II

It is plain that that sheer impracticality makes it implausible to expect the State *itself* to apprise its citizenry of the enactment of a statute of general applicablility. The State may, however, feasibly provide notice when it asserts an interest directly adverse to particular persons, and may in that circumstance be constitutionally compelled to do so. That is not the situation presented in this case, for the mineral interest owner's failure to comply with the statute results in neither a fine nor an escheat. Rather, his interest is effectively transferred to the surface owner. While the State is not disinterested, as a policy matter, in whether the mineral interest owner files a notice of claim, it sanctions a failure to comply by adjusting the relative rights of the mineral interest owner as against another citizen. In this context it is again helpful to examine—and contrast—the reasons supporting the lack of notice in the context of retrospectively applied limitations periods.

First, statutes of limitations "are practical and pragmatic devices to spare the courts from litigation of stale claims, and the citizen from being put to his defense after memories have faded, witnesses have died or disappeared, and evidence has been lost." *Chase Securities Corp.* v. *Donaldson*, 325 U. S. 304, 314 (1945). The very interest asserted by the State in imposing a statute of limitations—avoiding trial of stale claims—would be defeated by extending the time in which the plaintiff may bring his suit until such time as he may learn of the existence of the statute or the fact that it may soon run. In addition, with respect to statutes of limitations, pre-expiration notice is, as a practical matter, impossible: The potential defendant may not be aware of the potential plaintiff's injury, let alone the plaintiff's future intention to sue. Under these circumstances the potential defendant cannot be expected to monitor the law on behalf of his future—perhaps unknown—adversary. In sum, a State need not make provision for notice with respect to the retroactive application of a statute where it would defeat a legitimate State interest, or would be infeasible in the context of the statutory scheme.

In this case, Indiana asserts an interest in ensuring the productive use of land within its boundaries, and particularly in promoting the exploitation of land containing energy resources such as coal, gas and oil. The existence of stale and abandoned mineral interests impedes the development of those mineral resources, and hinders the development of the surface as well, by preventing the willing buyer from making contact with a willing seller. To facilitate the operation of the market with respect to mineral development, Indiana has required, by the statute at issue here, that the mineral interest owner file a statement of his claim once every 20 years, or suffer extinguishment of his unused interest. This minimal burden on the mineral rights owner is intended to ensure that the interest owner is identifiable, and thus suffices to maintain his accessability to potential purchasers. Should the notice not be filed, the State's interest in identification is equally well served: the surface owner, presumably identified readily by virtue of his interest in a parcel of tangible property, becomes the beneficiary of the mineral interest owners' default. By facilitating identification of the owners of the mineral interest, the statute permits the willing buyer—presumably someone who *would* wish to put the land to productive use—to locate the presumably willing seller, and thus reach the type of deal that could lead to an economically productive use of the land. With the respect to the treatment of mineral interst owners, such as appellants here, whose 20 year period had run or partially run as of the date of the enactment, the State's interest is no different. Although the operative period may be abbreviated, the State seeks only to ensure either use, or identification.

It is difficult to conceive how the State's interest is served by *not* requiring the surface owner to notify the mineral rights owner before taking title to his interest; I do not understand either the private appellees, or the State of Indiana as intervenor, to identify any affirmative state interest in failing to provide for pre-extinguishment notice. It might be supposed that a requirement of pre-extinguishment notice by the surface owner would present an untoward economic burden on the surface owner that would impede the purposes of the statute or would otherwise be inconsistent with the statutory framework. But it is plain on the face of the statute that this is not so.

Although the statute is self-executing as to one class of mineral interest owners, notice is required before the interests of another class of mineral interest owners are terminated. If the mineral interest owner is one who owns ten mineral interests in the county, has made diligent effort to preserve his interest, and his failure to preserve is inadvertant, he is afforded the opportunity to file a statement of claim "within sixty [60] days after publication of notice as provided in section seven [32–5–11–7] [*sic*] herein, if such notice is published, and if no such notice is published, within sixty [60] days after receiving actual knowledge that such mineral interest had lapsed."[5] Ind. Code § 32–5–11–5(4)

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[5] It may be, as the Court holds, that the State may rationally prefer the holders of ten interests to those who hold less, and that the holders of more

(1976). The person charged with the *responsibility* of providing notice by publication to a holder of ten interests or more, is, of course, the surface owner. And indeed, the statute sets forth explicitly the manner in which such notice by publication is to be made:

> "Any person who will succeed to the ownership of any mineral interest, upon the lapse thereof, may give notice of the lapse of such mineral interest by publishing the same in a newspaper of general circulation in the county in which such mineral interest is located, and, if the address of such mineral interest owner is shown of record or can be determined upon reasonable inquiry, by mailing within ten days after such publication a copy of such notice to the owner of such mineral interest. The notice shall state the name of the owner of such mineral interest, as shown of record, a description of the land, and the name of the person giving such notice. If a copy of such notice, together with an affidavit of service thereof, shall be promptly filed in the office of the recorder of deeds in the county wherein such land is located, the record thereof shall be prima facie evidence, in any legal proceedings, that such notice was given." Ind. Code § 32-5-11-6 (1976).

Because no surface property owner could claim clear title to the mineral interest absent such notice—or else a potential purchaser would suffer the possibility that some holder of ten or more interests might later come forward to claim his rights—such notice is, in practical operation, likely to be provided in every case. The only difficulty is that as construed by the Court today, the statutory notice comes too late for

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numerous claims may thus be afforded special protections. The distinction drawn between the two classes of holders would thus survive the scrutiny of the Equal Protection Clause. The Court opinion fails, however, to identify any state interest in denying notice to a holder of less than ten interests in the first instance.

mineral interest holders in the position of appellants to assert their continued interest in their property rights. Because it is clear to me that a form of pre-extinguishment notice, procedurally comparable to that statutorily provided with respect to owners of ten interests or more, is entirely consistent with the asserted legislative purpose, I would hold that such notice was constitutionally required before a person, otherwise without notice of his obligations under the statute, might be deprived of his property "by operation of law."

III

In the exercise of a State's police powers, and perhaps particularly with respect to matters involving the regulation of land, we owe the judgments of state legislatures great deference. Nevertheless, the Due Process Clause of the Fourteenth Amendment was designed to guard owners of property from the wholly arbitrary actions of state governments. As applied retrospectively to extinguish the rights of mineral interest owners for their failure to have made use of their interests within a prior 20 year period, Indiana's statutory scheme would likely effect an unlawful taking of property absent the proviso that such mineral interest owners could preserve their rights by filing a notice of claim within the two year grace period. Given the nature of the scheme established, there is no discernible basis for failing to afford those owners such notice as would make the saving proviso meaningful. As applied to mineral interest owners who were without knowledge of their legal obligations, and who were not permitted to file a saving statement of claim within some period following the giving of statutory notice by the surface owner, the statute operates unconstitutionally. In my view, under these circumstances, the provision of no process simply cannot be deemed due process of law. I respectfully dissent.

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All issues available have been filmed. Unfortunately, any scattered missing issues are no longer available.

981/81-9

(Slip Opinion)

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Lumber Co.*, 200 U. S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

WASHINGTON ET AL. *v.* SEATTLE SCHOOL DISTRICT NO. 1 ET AL.

APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 81-9. Argued March 22, 1982—Decided June 30, 1982

In 1978, appellee Seattle School District No. 1 (District) enacted the so-called Seattle Plan for desegregation of its schools. The plan makes extensive use of mandatory busing. Subsequently, a statewide initiative (Initiative 350) was drafted to terminate the use of mandatory busing for purposes of racial integration in the public schools of the State of Washington. The initiative prohibits school boards from requiring any student to attend a school other than the one geographically nearest or next nearest to his home. It sets out a number of broad exceptions to this requirement, however: a student may be assigned beyond his neighborhood school if he requires special educational programs, or if the nearest or next nearest school is overcrowded or unsafe, or if it lacks necessary physical facilities. These exceptions permit school boards to assign students away from their neighborhood schools for virtually all of the nonintegrative purposes required by their educational policies. After the initiative was passed at the November 1978 general election, the District, together with two other districts, brought suit against appellant State in Federal District Court, challenging the constitutionality of Initiative 350 under the Equal Protection Clause of the Fourteenth Amendment. The District Court held the initiative unconstitutional on the ground, *inter alia*, that it established an impermissible racial classification in violation of *Hunter* v. *Erickson*, 393 U. S. 385, and *Lee* v. *Nyquist*, 318 F. Supp. 710 (WDNY), summarily aff'd, 402 U. S. 935, "because it permits busing for non-racial reasons but forbids it for racial reasons." The court permanently enjoined implementation of the initiative's restrictions. The Court of Appeals affirmed.

Held: Initiative 350 violates the Equal Protection Clause. Pp. 9–29.

(a) When a State allocates governmental power nonneutrally, by ex-

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plicitly using the *racial* nature of a decision to determine the decisionmaking process, its action "places *special* burdens on racial minorities within the governmental process," *Hunter v. Erickson*, 393 U. S., at 391, thereby "making it *more* difficult for certain racial and religious minorities [than for other members of the community] to achieve legislation that is in their interest." *Id.*, at 395. Such a structuring of the political process is "no more permissible than [is] denying [members of a racial minority] the vote, on an equal basis with others." *Id.*, at 391. Pp. 9–12.

(b) Initiative 350 must fall because it does "not attemp[t] to allocate governmental power on the basis of any general principle," *Hunter* v. *Erickson*, 393 U. S., at 395, but instead uses the racial nature of an issue to define the governmental decisionmaking structure, thus imposing substantial and unique burdens on racial minorities. The initiative worked a major reordering of the State's educational decisionmaking process. Before adoption of the initiative, the power to determine what programs would most appropriately fill a school district's educational needs—including programs involving student assignment and desegregation—was committed to the local board's discretion. After passage of Initiative 350, authority over all but one of these areas remained in the local board's hands. By placing power over desegregative busing at the state level, the initiative thus "differentiates between the treatment of problems involving racial matters and that afforded other problems in the same area." *Lee* v. *Nyquist*, 318 F. Supp., at 718. And Initiative 350 works something more than the "mere repeal" of a desegregation law by the political entity that created it. It burdens all future attempts to integrate Washington schools by lodging decisionmaking authority over the question at a new and remote level of government. This makes the enactment of racially beneficial legislation uniquely difficult, and therefore imposes direct and undeniable burdens on minority interests. Pp. 12–26.

(c) Contrary to appellants' suggestion, *Hunter* v. *Erickson* was not effectively overruled by *Washington* v. *Davis*, 426 U. S. 229, and *Arlington Heights* v. *Metropolitan Housing Dev. Corp.*, 429 U. S. 252. While *Washington* v. *Davis* and *Arlington Heights* considered classifications facially unrelated to race, *Hunter*—like this case—involved an attempt to use explicitly racial criteria to define the community's decisionmaking structure. In so doing, the legislation at issue there directly and invidiously curtailed "the operation of those political processes ordinarily to be relied upon to protect minorities." *United States* v. *Caro-*

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Syllabus

lene Products Co., 304 U. S. 144, 152–153, n. 4. *Hunter's* principle—that meaningful and unjustified distinctions based on race are impermissible—is still vital. Pp. 26–29.

633 F. 2d 1338, affirmed.

BLACKMUN, J., delivered the opinion of the Court, in which BRENNAN, WHITE, MARSHALL, and STEVENS, JJ., joined. POWELL, J., filed a dissenting opinion, in which BURGER, C. J., and REHNQUIST and O'CONNOR, JJ., joined.

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SUPREME COURT OF THE UNITED STATES

No. 81–9

WASHINGTON, ET AL., APPELLANTS *v.* SEATTLE SCHOOL DISTRICT NO. 1, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

[June 30, 1982]

JUSTICE BLACKMUN delivered the opinion of the Court.

We are presented here with an extraordinary question: whether an elected local school board may use the Fourteenth Amendment to *defend* its program of busing for integration from attack by the State.

I

A

Seattle School District No. 1 (District), which is largely coterminous with the city of Seattle, Wash., is charged by state law with administering 112 schools and educating approximately 54,000 public school students. About 37% of these children are of Negro, Asian, American Indian, or Hispanic ancestry. Because segregated housing patterns in Seattle have created racially imbalanced schools, the District historically has taken steps to alleviate the isolation of minority students; since 1963, it has permitted students to transfer from their neighborhood schools to help cure the District's racial imbalance.[1]

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[1] In 1971, the District implemented a program of mandatory reassignments to integrate certain of its middle schools. This prompted an attempt to recall four school board members who had voted for the program. That attempt narrowly failed. See 473 F. Supp. 996, 1006 (WD Wash.

Despite these efforts, the District in 1977 came under increasing pressure to accelerate its program of desegregation.[2] In response, the District's Board of Directors (School Board) enacted a resolution defining "racial imbalance" as "the situation that exists when the combined minority student enrollment in a school exceeds the districtwide combined average by 20 percentage points, provided that the single minority enrollment . . . of no school will exceed 50 percent of the student body." 473 F. Supp. 996, 1006 (WD Wash. 1979). The District resolved to eliminate all such imbalance from the Seattle public schools by the beginning of the 1979–1980 academic year.[3]

In September 1977, the District implemented a "magnet" program, designed to alleviate racial isolation by enhancing educational offerings at certain schools, thereby encouraging voluntary student transfers. A "disproportionate amount of the overall movement" inspired by the program was undertaken by Negro students, however, *id.*, at 1006, and racial imbalance in the Seattle schools was found to have actually increased between the 1970–1971 and 1977–1978 academic years. The District therefore concluded that mandatory re-

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1979).

[2] Several community organizations threatened legal action if the District did not initiate a more effective integration effort, while the Mayor of Seattle and a number of community leaders, by letter dated May 20, 1977, urged the District to adopt "a definition of racial isolation and measurable goals leading to the elimination of racial isolation in the Seattle Public Schools prior to a Court ordered and mandated desegregation remedy." App. 139.

[3] The District Court found that the actions of the School Board were prompted by its members' "desire to ward off threatened litigation, their desire to prevent the threatened loss of federal funds, their desire to relieve the black students of the disproportionate burden which they had borne in the voluntary efforts to balance the schools racially and their perception that racial balance in the schools promotes the attainment of equal educational opportunity and is beneficial in the preparation of all students for democratic citizenship regardless of their race." 473 F. Supp., at 1007.

assignment of students was necessary if racial isolation in its schools was to be eliminated. Accordingly, in March 1978, the School Board enacted the so-called "Seattle Plan" for desegregation. The plan, which makes extensive use of busing and mandatory reassignments, desegregates elementary schools by "pairing" and "triading" predominantly minority with predominantly white attendance areas, and by basing student assignments on attendance zones rather than on race. The racial makeup of secondary schools is moderated by "feeding" them from the desegregated elementary schools. App. 142–143. The District represents that the plan results in the reassignment of roughly equal numbers of white and minority students, and allows most students to spend roughly half of their academic careers attending a school near their homes. Brief for Appellee Seattle School District 5.

The desegregation program, implemented in the 1978–1979 academic year, apparently was effective: the District Court found that the Seattle Plan "has substantially reduced the number of racially imbalanced schools in the district and has substantially reduced the percentage of minority students in those schools which remain racially imbalanced." 473 F. Supp., at 1007.

B

In late 1977, shortly before the Seattle Plan was formally adopted by the District, a number of Seattle residents who opposed the desegregation strategies being discussed by the School Board formed an organization called the Citizens for Voluntary Integration Committee (CiVIC). This organization, which the District Court found "was formed because of its founders' opposition to The Seattle Plan," 473 F. Supp., at 1007, attempted to enjoin implementation of the Board's mandatory desegregation program though litigation in state court; when these efforts failed, CiVIC drafted a statewide initiative designed to terminate the use of mandatory busing for purposes of racial integration.[4] This proposal, known as Initiative 350, provided that "no school board . . . shall directly or indirectly require any student to attend a school other than the school which is geographically nearest or next nearest the student's place of residence . . . and which offers the course of study pursued by such student. . . ." See Wash. Rev. Code § 28A.26.010 (1981).[5] The initiative then set out, however, a number of broad exceptions to this requirement: a student may be assigned beyond his neighborhood school if he "requires special education, care or guidance," or if "there are health or safety hazards, either natural or man made, or physical barriers or obstacles . . . between the student's place of residence and the nearest or next nearest school," or if "the school nearest or next nearest to his place of residence is unfit or inadequate because of overcrowding, unsafe conditions or lack of physical facilities." See *ibid.* Initiative 350 also specifically proscribed use of seven enumerated methods of "indirec[t]" student assignment—among them the redefinition of attendance zones, the pairing of schools, and the use of "feeder" schools—that are a part of the Seattle Plan. See § 28A.26.030. The initiative envisioned busing for racial purposes in only one circumstance: it did not purport to "prevent any court of competent jurisdiction from adjudicating constitutional issues relating to the public schools." See § 28A.26.060.

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[4] Washington's Constitution reserves to the people of the State "the power to propose bills, laws, and to enact or reject the same at the polls, independent of the legislature." Wash. Const. Art. II, § 1. Such initiatives are placed on the ballot upon the petition of 8% of the State's voters registered and voting for governor at the last preceding regular gubernatorial election. § 1(a). If passed by the electorate, an initiative may not be repealed by the state legislature for two years, although it may be amended within two years by a vote of two-thirds of each house of the legislature. § 41. See generally Comment, Judicial Review of Laws Enacted by Popular Vote, 55 Wash. L. Rev. 175 (1979).

[5] The text of Initiative 350 is now codified as Wash. Rev. Code §§ 28A.26.010–28A.26.900 (1981).

Its proponents placed Initiative 350 on the Washington ballot for the November 1978 general election. During the ensuing campaign, the District Court concluded, the leadership of CiVIC "acted legally and responsibly," and did not address "its appeals to the racial biases of the voters." 473 F. Supp., at 1009. At the same time, however, the court's findings demonstrate that the initiative was directed solely at desegregative busing in general, and at the Seattle Plan in particular. Thus, "[e]xcept for the assignment of students to effect racial balancing, the drafters of Initiative 350 attempted to preserve to school districts the maximum flexibility in the assignment of students," *id.*, at 1008, and "[e]xcept for racially-balancing purposes" the initiative "permits local school districts to assign students other than to their nearest or next nearest schools for most, if not all, of the major reasons for which students are at present assigned to schools other than their nearest or next nearest schools." *Id.*, at 1010.[6] In campaigning for the measure, CiVIC officials accurately represented that its passage would result in "no loss of school district flexibility other than in busing for desegregation purposes," *id.*, at 1008, and it is evident that the campaign focused almost exclusively on the wisdom of "forced busing" for integration. See *id.*, at 1009.

On November 8, 1978, two months after the Seattle Plan went into effect, Initiative 350 passed by a substantial margin, drawing almost 66% of the vote statewide. The initative failed to attract majority support in two state legislative districts, both in Seattle. In the city as a whole, however, the initiative passed with some 61% of the vote. Within the month, the District, together with the Tacoma and Pasco school districts,[7] initiated this suit against the

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[6] At the beginning of the 1978–1979 academic year, approximately 300,000 of the 769,040 students enrolled in Washington's public schools were bused to school. Ninety-five percent of these students were transported for reasons unrelated to race. 473 F. Supp., at 1002.

[7] Along with Seattle, Tacoma School District No. 10 and Pasco School District No. 1 are the only districts in the State of Washington with com-

State in United States District Court for the Western District of Washington, challenging the constitutionality of Initiative 350 under the Equal Protection Clause of the Fourteenth Amendment. The United States and several community organizations intervened in support of the District[6]; CiVIC intervened on behalf of the defendants.

After a nine-day trial, the District Court made extensive and detailed findings of fact. The court determined that "[t]hose Seattle schools which are most crowded are located in those areas of the city where the preponderance of minority families live." 473 F. Supp., at 1001. Yet the court found that Initiative 350, if implemented, "will prevent the racial balancing of a significant number of Seattle schools and will cause the school system to become more racially imbalanced than it presently is," "will make it impossible for Tacoma schools to maintain their present racial balance," and will make "doubtful" the prospects for integration of the Pasco schools. *Id.*, at 1010; see *id.*, at 1001, 1011. Except for desegregative busing, however, the court found that "almost all of the busing of students currently taking place in

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prehensive integration programs, and therefore the three are the only districts affected by Initiative 350. See 473 F. Supp., at 1009. Since 1965, Pasco has made use of school closures and a mandatory busing program to overcome the racial isolation caused by segregated housing patterns; if students attended the schools nearest their homes, three of Pasco's seven elementary schools would have a primarily white and three a primarily minority student body. *Id.*, at 1002–1003. The Tacoma school district has made use of school closures, racially controlled enrollment at magnet schools, and voluntary transfers—though not mandatory busing—to enhance racial balance in its schools. *Id.*, at 1003–1004.

[6] Several of the intervenor plaintiffs also alleged that the District had engaged in *de jure* segregation, and therefore was operating an unconstitutional dual school system. The District Court therefore bifurcated the litigation, first addressing the constitutionality of Initiative 350. Because of the court's conclusions on that question, the allegations of *de jure* segregation did not go to trial and have not been addressed by the District Court or by the Court of Appeals.

[Washington] is permitted by Initiative 350." *Id.*, at 1010. And while the court found that "racial bias . . . is a factor in the opposition to the 'busing' of students to obtain racial balance," *id.*, at 1001, it also found that voters were moved to support Initiative 350 for "a number of reasons," so that "[i]t is impossible to ascertain all of those reasons [o]r to determine the relative impact of those reasons upon the electorate." *Id.*, at 1010.

The District Court then held Initiative 350 unconstitutional, for three independent reasons. The court first concluded that the initiative established an impermissible racial classification, in violation of *Hunter* v. *Erickson*, 393 U. S. 385 (1969), and *Lee* v. *Nyquist*, 318 F. Supp. 710 (WDNY 1970) (three-judge court), summarily aff'd, 402 U. S. 935 (1971), "because it permits busing for non-racial reasons but forbids it for racial reasons." 473 F. Supp., at 1012. The court next held Initiative 350 invalid because "a racially discriminatory purpose was one of the factors which motivated the conception and adoption of the initiative." *Id.*, at 1013.[9] Finally, the District Court reasoned that Initiative 350 was unconstitutionally overbroad, because in the absence of a court order it barred even school boards that had engaged in *de jure* segregation from taking steps to foster integration.[10]

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[9] The District Court acknowledged that it was impossible to determine whether the supporters of Initiative 350 "subjectively [had] a racially discriminatory intent or purpose," because "[a]s to that subjective intent the secret ballot raises an impenetrable barrier." 473 F. Supp., at 1014. The court looked instead to objective factors, noting that it "marked [a] departure from the norm . . . for the autonomy of school boards to be restricted relative to the assignment of students," and that it marked a similar "departure from the procedural norm" for "an administrative decision of a subordinate local unit of government . . . [to be] overridden in a statewide initiative." *Id.*, at 1016. These factors, when coupled with the "racially disproportionate impact of the initiative," its "historical background," and "the sequence of events leading to its adoption," were found to demonstrate that a "racially discriminatory intent or purpose was at least one motivating factor in the adoption of the initiative." *Ibid.*

[10] The District Court noted that school boards that had practiced *de jure*

Id., at 1016. The court permanently enjoined implementation of the initiative's restrictions.

On the merits, a divided panel of the United States Court of Appeals for the Ninth Circuit affirmed, relying entirely on the District Court's first rationale. 633 F. 2d 1338 (1980).[11] By subjecting desegregative student assignments to unique treatment, the Court of Appeals concluded, Initiative 350 "both creates a constitutionally-suspect racial classification and radically restructures the political process of Washington by allowing a state-wide majority to usurp traditional local authority over local school board educational policies." 633 F. 2d, at 1344. In doing so, the court continued, the initiative "*remove[s]* from local school boards their existing authority, and in large part their capability, to enact programs designed to desegregate the schools." *Id.*, at 1346 (emphasis in original; citation omitted). The court found such a result contrary to the principles of *Hunter* v. *Erickson*, *supra*, and *Lee* v. *Nyquist*, *supra*. The court acknowledged that the issue would be a different one had a successor school board attempted to rescind the Seattle Plan. Here, however, "a different governmental body—the state-wide electorate—rescinded a policy voluntarily enacted by locally elected school boards already subject to local political control." 633 F. 2d, at 1346.[12]

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segregation are under an affirmative obligation to eliminate the effects of that practice. 473 F. Supp., at 1016. See *Columbus Board of Education* v. *Penick*, 443 U. S. 449, 458–459 (1979).

[11] The Court of Appeals therefore did not address the District Court's alternative finding that Initiative 350 had been adopted for discriminatory reasons, or its conclusion that the initiative was overbroad. 633 F. 2d, at 1342.

[12] After the decision on the merits, the District Court had declined to award attorney's fees to the plaintiff school districts because the districts are state-funded entities. App. to Juris. Statement C-1. The Court of Appeals reversed on this issue, concluding that the District Court had abused its discretion in denying fees. The Court of Appeals determined

The State appealed to this Court. We noted probable jurisdiction to address an issue of significance to our Nation's system of education. 454 U. S. 890 (1981).

II

The Equal Protection Clause of the Fourteenth Amendment guarantees racial minorities the right to full participation in the political life of the community. It is beyond dispute, of course, that given racial or ethnic groups may not be denied the franchise, or precluded from entering into the political process in a reliable and meaningful manner. See *White* v. *Regester*, 412 U. S. 755 (1973); *Nixon* v. *Herndon*, 273 U. S. 536 (1927). But the Fourteenth Amendment also reaches "a political structure that treats all individuals as equals," *Mobile* v. *Bolden*, 446 U. S. 55, 84 (1980) (STEVENS, J., concurring in the judgment), yet more subtly distorts governmental processes in such a way as to place special burdens on the ability of minority groups to achieve beneficial legislation.

This principle received its clearest expression in *Hunter* v. *Erickson*, *supra*, a case that involved attempts to overturn antidiscrimination legislation in Akron, Ohio. The Akron city council, pursuant to its ordinary legislative processes, had enacted a fair housing ordinance. In response, the local citizenry, using an established referendum procedure, see 393 U. S., at 390, and n. 6; 393–394, and n. * (Harlan, J., concurring), amended the city charter to provide that ordinances regulating real estate transactions "on the basis of race, color, religion, national origin or ancestry must first be approved by a majority of the electors voting on the question at

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that the school districts fell within the language of the attorney's fees statutes, 42 U. S. C. § 1988 and 20 U. S. C. § 3205, see n. 28, *infra*, and it reasoned that "[a]s long as a publicly-funded organization advances important constitutional values, it is eligible for fees under the statutes." 633 F. 2d, at 1348.

a regular or general election before said ordinance shall be effective." *Id.*, at 387. This action "not only suspended the operation of the existing ordinance forbidding housing discrimination, but also required the approval of the electors before any future [fair housing] ordinance could take effect." *Id.*, at 389–390. In essence, the amendment changed the requirements for the adoption of one type of local legislation: to enact an ordinance barring housing discrimination on the basis of race or religion, proponents had to obtain the approval of the city council *and* of a majority of the voters citywide. To enact an ordinance preventing housing discrimination on other grounds. or to enact any other type of housing ordinance, proponents needed the support of only the city council.

In striking down the charter amendment, the *Hunter* Court recognized that, on its face, the provision "draws no distinctions among racial and religious groups." 393 U. S., at 390. But it did differentiate "between those groups who sought the law's protection against racial . . . discriminations in the sale and rental of real estate and those who sought to regulate real property transactions in the pursuit of other ends," *ibid.*, thus "disadvantag[ing] those who would benefit from laws barring racial . . . discriminations as against those who would bar other discriminations or who would otherwise regulate the real estate market in their favor." *Id.*, at 391. In "reality," the burden imposed by such an arrangement necessarily "falls on the minority. The majority needs no protection against discrimination and if it did, a referendum might be bothersome but no more than that." *Ibid.* In effect, then, the charter amendment served as an "explicitly racial classification treating racial housing matters differently from other racial and housing matters." *Id.*, at 389. This made the amendment constitutionally suspect: "the State may no more disadvantage any *particular* group by making it more difficult to enact legislation in its behalf than it may dilute any person's vote or give any group a smaller representation than another of comparable size." *Id.*, at 393 (emphasis added).

Lee v. *Nyquist*, 318 F. Supp. 710 (WDNY 1970) (three-judge court), offers an application of the *Hunter* doctrine in a setting strikingly similar to the one now before us. That case involved the New York education system, which made use of both elected and appointed school boards and which conferred extensive authority on state education officials. In an effort to eliminate *de facto* segregation in New York's schools, those officials had directed the city of Buffalo—a municipality with an appointed school board—to implement an integration plan. While these developments were proceeding, however, the New York Legislature enacted a statute barring state education officials and appointed—though not elected—school boards from "assign[ing] or compell[ing] [students] to attend any school on account of race . . . or for the purpose of achieving [racial] equality in attendance . . . at any school." 318 F. Supp., at 712.[13]

Applying *Hunter*, the three-judge District Court invalidated the statute, noting that under the provision "[t]he Commissioner [of Education] and local appointed officials are prohibited from acting in [student assignment] matters only where racial criteria are involved." *Id.*, at 719. In the court's view, the statute therefore "place[d] *burdens* on the implementation of educational policies designed to deal with race on the local level" by "treating educational matters involving racial criteria differently from other educational matters and making it more difficult to deal with racial imbalance in the public schools." *Id.*, at 719 (emphasis in original). This drew an impermissible distinction "between the treatment of problems involving racial matters and that afforded other problems in the same area." *Id.*, at 718. This Court affirmed the District Court's judgment without opinion. 402 U. S. 935 (1971).

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[13] As does Initiative 350, the New York statute apparently permitted voluntary student transfers to achieve integration. See n. 16, *infra*.

These cases yield a simple but central principle. As Justice Harlan noted while concurring in the Court's opinion in *Hunter*, laws structuring political institutions or allocating political power according to "neutral principles"—such as the executive veto, or the typically burdensome requirements for amending state constitutions—are not subject to equal protection attack, though they may "make it more difficult for minorities to achieve favorable legislation." 393 U. S., at 394. Because such laws make it more difficult for *every* group in the community to enact comparable laws, they "provid[e] a just framework within which the diverse political groups in our society may fairly compete." *Id.*, at 393. Thus, the political majority may generally restructure the political process to place obstacles in the path of everyone seeking to secure the benefits of governmental action. But a different analysis is required when the State allocates governmental power non-neutrally, by explicitly using the *racial* nature of a decision to determine the decisionmaking process. State action of this kind, the Court said, "places *special* burdens on racial minorities within the governmental process," *id.*, at 391 (emphasis added), thereby "making it *more* difficult for certain racial and religious minorities [than for other members of the community] to achieve legislation that is in their interest." *Id.*, at 395 (emphasis added) (Harlan, J., concurring). Such a structuring of the political process, the Court said, was "no more permissible than [is] denying [members of a racial minority] the vote, on an equal basis with others." *Id.*, at 391.

III

We believe that the Court of Appeals properly focused on *Hunter* and *Lee*, for we find the principle of those cases dispositive of the issue here. In our view, Initiative 350 must fall because it does "not attemp[t] to allocate governmental power on the basis of any general principle." *Hunter* v. *Erickson*, 393 U. S., at 395 (Harlan, J., concurring). Instead, it uses the racial nature of an issue to define the governmental decisionmaking structure, and thus imposes substantial and unique burdens on racial minorities.

A

Noting that Initiative 350 nowhere mentions "race" or "integration," appellants suggest that the legislation has no racial overtones; they maintain that *Hunter* is inapposite because the initiative simply permits busing for certain enumerated purposes while neutrally forbidding it for all other reasons. We find it difficult to believe that appellants' analysis is seriously advanced, however, for despite its facial neutrality there is little doubt that the initiative was effectively drawn for racial purposes. Neither the initiative's sponsors, nor the District Court, nor the Court of Appeals had any difficulty perceiving the racial nature of the issue settled by Initiative 350. Thus, the District Court found that the text of the referendum was carefully tailored to interfere only with desegregative busing.[14] Proponents of the initiative candidly "represented that there would be no loss of school district flexibility other than in busing for desegregation purposes." 473 F. Supp., at 1008. And, as we have noted, Initiative 350 in fact allows school districts to bus their students "for most, if not all," of the non-integrative purposes required by their educational policies. *Id.*, at 1010. The Washington electorate surely was aware of this, for it was "assured" by CiVIC officials that "'99% of the school districts in the state'"—those that lacked mandatory integration programs—"would not be affected by the passage of 350." *Id.*, at 1008–1009.

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[14] The Court of Appeals accepted the District Court's characterization of the initiative, and even the dissenting judge in the Court of Appeals agreed that Initiative 350 addresses a "racial" problem. 633 F. 2d, at 1353.

It is beyond reasonable dispute, then, that the initiative was enacted "'because of,' not merely 'in spite of,' its adverse effects upon" busing for integration. *Personnel Administrator of Massachusetts* v. *Feeney*, 442 U. S. 256, 279 (1979).

Even accepting the view that Initiative 350 was enacted for such a purpose, the United States—which has changed its position during the course of this litigation, and now supports the State—maintains that busing for integration, unlike the fair housing ordinance involved in *Hunter*, is not a peculiarly "racial" issue at all. Brief for United States 17, n. 18. Again, we are not persuaded. It undoubtedly is true, as the United States suggests, that the proponents of mandatory integration cannot be classified by race: Negroes and whites may be counted among both the supporters and the opponents of Initiative 350. And it should be equally clear that white as well as Negro children benefit from exposure to "ethnic and racial diversity in the classroom." *Columbus Board of Education* v. *Penick*, 443 U. S. 449, 486 (1979) (POWELL, J., dissenting). See *Milliken* v. *Bradley*, 418 U. S. 717, 783 (1974) (MARSHALL, J., dissenting).[15] But neither of these factors serves to distinguish *Hunter*, for we may fairly assume that members of the racial majority both favored and benefited from Akron's fair housing ordinance. Cf. *Havens Realty Corp.* v. *Coleman*, —— U. S. ——, —— (1982) (slip op. 11–12, and n. 17); *Gladstone, Realtors* v. *Village of Bellwood*, 441 U. S. 91, 111, 115 (1979).

In any event, our cases suggest that desegregation of the public schools, like the Akron open housing ordinance, at bottom inures primarily to the benefit of the minority, and is designed for that purpose. Education has come to be "a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment." *Brown* v. *Board of Education*, 347 U. S. 483, 493 (1954). When that environment is largely shaped by members of different racial and cultural groups, minority children can achieve their full measure of success only if they learn to function in—and are fully accepted by—the larger community. Attending an ethnically diverse school may help accomplish this goal by preparing minority children "for citizenship in our pluralistic society," *Estes* v. *Metropolitan Branches of the Dallas NAACP*, 444 U. S. 437, 451 (1980) (POWELL, J., dissenting), while, we may hope, teaching members of the racial majority "to live in harmony and mutual respect" with children of minority heritage. *Columbus Board of Education* v. *Penick*, 443 U. S., at 485, n. 5 (POWELL, J., dissenting). *Lee* v. *Nyquist* settles this point, for the Court there accepted the proposition that mandatory desegregation strategies present the type of racial issue implicated by the *Hunter* doctrine.[16]

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[15] Appellants and the United States do not challenge the propriety of race-conscious student assignments for the purpose of achieving integration, even absent a finding of prior *de jure* segregation. We therefore do not specifically pass on that issue. See generally *Swann* v. *Charlotte-Mecklenberg Board of Education*, 402 U. S. 1, 16 (1971); *North Carolina State Board of Education* v. *Swann*, 402 U. S. 43, 45 (1971). Cf. *University of California Regents* v. *Bakke*, 438 U. S. 265, 300, n. 39, 312–314 (1978) (opinion of POWELL, J.).

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[16] The United States seeks to distinguish *Lee* by suggesting that the statute there at issue "clearly prohibited" all attempts to ameliorate racial imbalance in the schools, while Initiative 350 permits voluntary desegregation efforts. Brief for United States 25. Even assuming that this distinction would otherwise be of constitutional significance, its premise is not accurate. The legislation challenged in *Lee did* permit voluntary integration efforts, for it expressly exempted from its restrictions "the assignment of a pupil in the manner requested or authorized by his parents or guardian." 318 F. Supp., at 712. Thus, as the District Court in *Lee* noted, the statute "denie[d] appointed officials the power to implement *non-voluntary* programs for the improvement of racial balance." *Id.*, at 715 (emphasis added). The difficulty in *Lee*—as in this case—stemmed from the *Lee* District Court's conclusion that a voluntary program would not serve to integrate the community's schools: "Voluntary plans for achieving racial balance . . . have not had a significant impact on the problems of racial segregation in the Buffalo public schools; indeed it would ap-

It is undeniable that busing for integration—particularly when ordered by a federal court—now engenders considerably more controversy than does the sort of fair housing ordinance debated in *Hunter*. See *Estes* v. *Metropolitan Branches of the Dallas NAACP*, 444 U. S., at 448–451 (POWELL, J., dissenting). But in the absence of a constitutional violation, the desirability and efficacy of school desegregation are matters to be resolved through the political process. For present purposes, it is enough that minorities may consider busing for integration to be "legislation that is in their interest." *Hunter* v. *Erickson*, 393 U. S., at 395 (Harlan, J., concurring). Given the racial focus of Initiative 350, this suffices to trigger application of the *Hunter* doctrine.

B

We are also satisfied that the practical effect of Initiative 350 is to work a reallocation of power of the kind condemned in *Hunter*. The initiative removes the authority to address a racial problem—and only a racial problem—from the existing decisionmaking body, in such a way as to burden minority interests. Those favoring the elimination of *de facto* school segregation now must seek relief from the state legislature, or from the statewide electorate. Yet authority over all other student assignment decisions, as well as over most other areas of educational policy, remains vested in the local school board. Indeed, by specifically exempting from Initiative 350's proscriptions most non-racial reasons for assigning students away from their neighborhood schools, the initiative expressly requires those championing school integration to surmount a considerably higher hurdle than persons seeking comparable legislative action. As in *Hunter*, then, the com-

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pear that racial isolation is actually increasing." *Ibid.* Thus the statute challenged in *Lee* and Initiative 350 operated in precisely the same way to "deny . . . student[s] the right to attend a fully integrated school." Brief for United States 25.

munity's political mechanisms are modified to place effective decisionmaking authority over a racial issue at a different level of government.[17] In a very obvious sense, the initiative thus "disadvantages those who would benefit from laws bar-

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[17] JUSTICE POWELL finds *Hunter* completely irrelevant, dismissing it with the conclusory statement that "the political system [of Washington] has *not* been redrawn or altered." *Post*, at 10 (emphasis in original). But the dissent entirely fails to address the relevance of *Hunter* to the reallocation of decisionmaking authority worked by Initiative 350. The evil condemned by the *Hunter* Court was not the particular political obstacle of mandatory referenda imposed by the Akron charter amendment; it was, rather, the comparative structural burden placed on the political achievement of minority interests. Thus, in *Hunter*, the procedures for enacting racial legislation were modified in such a way as to place effective control in the hands of the city-wide electorate. Similarly here, the power to enact racial legislation has been reallocated. In each case, the effect of the challenged action was to redraw decisionmaking authority over racial matters—and only over racial matters—in such a way as to place comparative burdens on minorities. While JUSTICE POWELL and the United States find it crucial that the proponents of integrated schools remain free to use Washington"s initiative system to further their ends, that was true in *Hunter* as well: proponents of open housing were not barred from invoking Akron"s initiative procedures to repeal the charter amendment, or to enact fair housing legislation of their own. It surely is an excessively formal exercise, then, to argue that the procedural revisions at issue in *Hunter* imposed special burdens on minorities, but that the selective allocation of decisionmaking authority worked by Initiative 350 does not erect comparable political obstacles. Indeed, *Hunter* would have been virtually identical to this case had the Akron charter amendment simply barred the city council from passing any fair housing ordinance, as Initiative 350 forbids the use of virtually all mandatory desegregation strategies. Surely, however, *Hunter* would not have come out the other way had the charter amendment made *no* provision for the passage of fair housing legislation, instead of subjecting such legislation to ratification by referendum.

The United States also would note that Initiative 350's "modification of state policy [was] not the result of any unusual political procedure," Brief for the United States 30, for initiatives and referenda are often used by the Washington electorate. But that observation hardly serves to distinguish this case from *Hunter*, since the fair housing charter amendment was added through the unexceptional use of Akron's initiative procedure. See ring" *de facto* desegregation "as against those who . . . would otherwise regulate" student assignment decisions; "the reality is that the law's impact falls on the minority." *Hunter* v. *Erickson*, 393 U. S., at 391.

The state appellants and the United States, in response to this line of analysis, argue that Initiative 350 has not worked *any* reallocation of power. They note that the State necessarily retains plenary authority over Washington's system of education, and therefore they suggest that the initiative amounts to nothing more than an unexceptional example of a State's intervention in its own school system. In effect, they maintain that the State functions as a "super school board," Tr. of Oral Arg. 5, 17, which typically involves itself in all areas of educational policy. And, the argument continues, if the State is the body that usually makes decisions in this area, Initiative 350 worked a simple change in policy rather than a forbidden reallocation of power. Cf. *Crawford* v. *Los Angeles Board of Education, post.*

This at first glance would seem to be a potent argument, for States traditionally have been accorded the widest latitude in ordering their internal governmental processes, see *Holt Civic Club* v. *Tuscaloosa*, 439 U. S. 60, 71 (1978), and school boards, as creatures of the State, obviously must give effect to policies announced by the state legislature. But "insisting that a State may distribute legislative power as it desires . . . furnish[es] no justification for a legislative structure which otherwise would violate the Fourteenth Amendment. Nor does the implementation of this change through popular referendum immunize it." *Hunter* v. *Erickson*, 393 U. S., at 392. The issue here, after all, is not whether Washington has the authority to intervene in the affairs of local school boards; it is, rather, whether the State has exercised that authority in a manner consistent with the Equal Protection Clause. As the Court noted in *Hunter*, "though

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393 U. S., at 387.

Akron might have proceeded by majority vote . . . on all its municipal legislation, it has instead chosen a more complex system. Having done so, the State may no more disadvantage any particular group by making it more difficult to enact legislation in its behalf than it may dilute any person's vote." *Id.*, at 392–393.[18] Washington also has chosen to make use of a more complex governmental structure, and a close examination both of the Washington statutes and of the Court's decisions in related areas convinces us that *Hunter* is fully applicable here.

At the outset, it is irrelevant that the State might have vested all decisonmaking authority in itself, so long as the political structure it in fact erected imposes comparative burdens on minority interests; that much is settled by *Hunter* and by *Lee.*[19] And until the passage of Initiative 350, Washington law in fact had established the local school board, rather than the State, as the entity charged with making decisions of the type at issue here. Like all 50 States, see Brief for National School Boards Assn. as *Amicus Curiae* 11, 14–16, Washington of course is ultimately responsible for providing education within its borders, see Wash. Const., Art. IX; Wash. Rev. Code § 28A.02.010 (1981); ch. 28A.41 (establishing a uniform school financing system); *Seattle School Dist.* v. *State*, 90 Wash. 2d 476, 585 P. 2d 71 (1978), and it therefore has set certain procedural requirements and minimum educational standards to be met by each school. See, *e. g.*, §§28A.01.010, 28A.01.020 (length of school day and year); ch. 28A.27 (mandatory attendance); ch. 28A.67 (teacher qualifications); ch. 28A.05 and §§28A.58.750–28A.58.754 (curriculum). But Washington has chosen to meet its educational responsibilities primarily through "state and local officials, boards, and committees," §28A.02.020, and the responsibility to devise and tailor educational programs to suit local needs has emphatically been vested in the local school boards.

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[18] Despite the force with which it is written, then, JUSTICE POWELL's essay on "the heretofore unquestioned right of a State to structure the decisionmaking authority of its government," *post*, at 6—as well as his observations on a State's right to repeal programs designed to eliminate *de facto* segregation—is largely beside the point. The State's *power* has not been questioned at any point during this litigation. The single narrow question before us is whether the State has exercised its power in such a way as to place special, and therefore impermissible, burdens on minority interests.

[19] The Court noted in *Hunter* that Akron "might have proceeded by majority vote . . . on all its municipal legislation," 393 U. S., at 392; the charter amendment was invalidated because the citizens of Akron did not reserve all power to themselves, but rather distributed it in a non-neutral manner. In *Lee*, of course, the State had unquestioned authority to vest all power over education in state officials.

Thus "each common school district board of directors" is made "accountable for the proper operation of [its] district to the local community and its electorate." §28A.58.758(1). To this end, each school board is "vested with the *final* responsibility for the setting of policies ensuring quality in the content and extent of its educational program" (emphasis added). *Ibid.* School boards are given responsibility for, among many other things, "establish[ing] performance criteria" for personnel and programs, for assigning staff "according to board enumerated classroom and program needs," for setting requirements concerning hours of instruction, for establishing curriculum standards "relevant to the particular needs of district students or the unusual characteristics of the district," and for evaluating teaching materials. §28A.58.758(2). School boards are generally directed to "develop a program identifying student learning objectives for their district[s]," §§28A.58.090; see also §28A.58.092, to select instructional materials, §28A.58.103, to stock libraries as they deem necessary, §28A.58.104, and to initiate a variety of optional programs. See, *e. g.*, §§28A.34.010, 28A.35.010, 28A.58.105. School boards, of course, are given broad corporate powers. §§28A.58.010, 28A.58.075, 28A.59.180. Significantly for present purposes, school boards are directed to determine which students should be bused to school and to provide those students with transportation. § 28A.24.055.

Indeed, the notion of school board responsibility for local educational programs is so firmly rooted that local boards are subject to disclosure and reporting provisions specifically designed to ensure the board's "accountability" to the people of the community for "the educational programs in the school distric[t]." § 28A.58.758(3). And, perhaps most relevantly here, before the adoption of Initiative 350 the Washington Supreme Court had found it within the general discretion of local school authorities to settle problems related to the denial of "equal educational opportunity."[20] *Citizens Against Mandatory Bussing* v. *Palmason*, 80 Wash. 2d 445, 453, 495 P. 2d 657, 663 (1972). It therefore had squarely held that a program of desegregative busing was a proper means of furthering the school board's responsibility to "administe[r] the schools in such a way as to provide a sound education for all children." *Id.*, at 456, 495 P. 2d, at 664.[21] See *State ex rel. Citizens Against Mandatory Bussing* v. *Brooks*, 80 Wash. 2d 121, 492 P. 2d 536 (1972); *State ex rel. Lukens* v. *Spokane School District*, 147 Wash. 467, 474, 266 P. 189, 191 (1928).[22]

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[20] Indeed, even the State's efforts to help ensure equal opportunity in education and to encourage desegregation are cast in cooperative terms, and are designed to assist school districts in implementing programs of their choosing. See, *e. g.*, Wash. Rev. Code §§ 28A.21.010(3), 28A.21.136(1) and (3) (1981); cf. § 28A.58.245(3).

[21] The Washington Supreme Court noted that "as long as the school board authorized or required students to attend schools geographically situated close to their homes, they had such a right. But the right existed only because it was given to them by the school authorities." 80 Wash. 2d, at 452, 495 P. 2d, at 662.

[22] We also note that the State has not attempted to reserve to itself exclusive power to deal with racial issues generally. Municipalities in Washington have been given broad powers of self-government, see generally Wash. Const., Amdt. 40; Wash. Rev. Code §§ 35.22.020, 35.23.440, 35.27.370, 35.30.010 (1981); Wash. Rev. Code Tit. 35A (Optional Municipal Code), and

Given this statutory structure, we have little difficulty concluding that Initiative 350 worked a major reordering of the State's educational decisionmaking process. Before adoption of the initiative, the power to determine what programs would most appropriately fill a school district's educational needs—including programs involving student assignment and desegregation—was firmly committed to the local board's discretion. The question whether to provide an integrated learning environment rather than a system of neighborhood schools surely involved a decision of that sort. See *Citizens Against Mandatory Bussing* v. *Palmason*, 80 Wash. 2d, at 459–460, 495 P. 2d, at 666–667. After passage of Initiative 350, authority over all but one of those areas remained in the hands of the local board. By placing power over desegregative busing at the state level, then, Initiative 350 plainly "differentiates between the treatment of problems involving racial matters and that afforded other problems in the same area." *Lee* v. *Nyquist*, 318 F.Supp., at 718.[23] The District

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Washington courts specifically have held that municipalities have the power to enact antidiscrimination ordinances. See, *e. g.*, *Seattle Newspaper-Web Pressmen's Union Local No. 26* v. *City of Seattle*, 24 Wash. App. 462, 604 P. 2d 170 (1979). Cf. 5 E. McQuillin, Municipal Corporations § 19.23, p. 425 (3d ed. rev. 1981).

[23] Throughout his dissent, JUSTICE POWELL insists that the Court has created a "vested constitutional right to local decisionmaking," *post*, at 11, that under our holding "the people of the State of Washington apparently are forever barred from developing a different policy on mandatory busing where a School District previously has adopted one of its own," *id.*, at 11, n. 13, and that today's decision somehow raises doubts about "the authority of a State to abolish school boards altogether." *Id.*, at 11. See also *id.*, at 8, and at 11, n. 14. These statements evidence a basic misunderstanding of our decision. Our analysis vests no rights, and has nothing to do with whether school board action predates that taken by the State. Instead, what we find objectionable about Initiative 350 is the comparative burden it imposes on minority participation in the political process—that is, the racial nature of the way in which it structures the *process* of decisionmaking. It is evident, then, that the horribles paraded by the dissent, *post*, at 11, n. 13—which have nothing to do with the ability of minor-

Court and the Court of Appeals similarly concluded that the initiative restructured the Washington political process, and we see no reason to challenge the determinations of courts familiar with local law. Cf. *Milliken* v. *Bradley*, 418 U. S., at 769 (WHITE, J., dissenting).

That we reach this conclusion should come as no surprise, for when faced with a similar educational scheme in *Milliken* v. *Bradley*, *supra*,[24] the Court concluded that the actions of a local school board could not be attributed to the State that had created it. We there addressed the Michigan education system, which vests in the State constitutional responsibility for providing education: "'The policy of [Michigan] has been to retain control of its school system, to be administered throughout the State under State laws by local State agencies . . . to carry out the delegated functions given [them] by the legislature.'" *Milliken* v. *Bradley*, 418 U. S., at 794 (MARSHALL, J., dissenting), quoting *School District of the City of Lansing* v. *State Board of Education*, 367 Mich. 591, 595, 116 N.W. 2d 866, 868 (1962). See *Milliken* v. *Bradley*, *supra*, at 726, n. 5. To fulfill this responsibility, the State of Michigan provided a substantial measure of school district funding, established standards for teacher certification, determined part of the curriculum, set a minimum school term, approved bus routes and textbooks, established disciplinary procedures, and under certain circumstances had the power even to remove local school board members. See *id.*, at 795–796 (MARSHALL, J., dissenting). See *id.*, at 726, n. 5, 727 (describing State controls over education); *id.*, at 768 and

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ities to participate in the process of self-government—are entirely unrelated to this case. It is equally clear, as we have noted at several points in our opinion, that the State remains free to vest all decisionmaking power in state officials, or to remove authority from local school boards in a race-neutral manner.

[24] One *amicus* observes that many States employ a similar educational structure. See Brief for National School Boards Assn. as *Amicus Curiae* 11, 14–16, App. 1a–10a.

n. 4 (WHITE, J., dissenting) (same); *id.*, at 794 (MARSHALL, J., dissenting) (same).

Yet the Court, noting that "[n]o single tradition in public education is more deeply rooted than local control over the operation of schools," concluded that the "Michigan educational structure . . . in common with most States, provides for a large measure of local control." *Id.*, at 741–742. Relying on this analysis, the Court determined that a Michigan school board's assignment policies could not be attributed to the State, and therefore declined to permit interdistrict busing as a remedy for one school district's acts of unconstitutional segregation. If local school boards operating under a similar statutory structure are considered separate entities for purposes of constitutional adjudication when they make segregative assignment decisions, it is difficult to see why a different analysis should apply when a local board's *desegregative* policy is at issue.

In any event, we believe that the question here is again settled by *Lee*. There, state control of the educational system was fully as complete as it now is in Washington. See generally N.Y. Educ. Law §§305, 306, 308–310 (McKinney) (1969 and Supp. 1981). The state statute under attack reallocated power over mandatory desegregation in two ways: it transferred authority from the State Commissioner of Education to local elected school boards, and it shifted authority from local appointed school boards to the state legislature.[25] When presented with this restructuring of the political process, the District Court declared that it could "conceive of no more compelling case for the application of the *Hunter* principle." 318 F. Supp., at 719. This Court of course affirmed the District Court's judgment. We see no relevant distinction between this case and *Lee*; indeed, it is difficult to imagine a more precise parallel.[28]

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[25] When authority to initiate desegregation programs was removed from appointed school boards and from state education officials, the only body capable of exercising power over such programs was the state legislature.

C

To be sure, "the simple repeal or modification of desegregation or anti-discrimination laws, without more, never has been viewed as embodying a presumptively invalid racial classification." *Crawford* v. *Los Angeles Board of Education, post,* at ——, (slip op. 10). See *Dayton Board of Education* v. *Brinkman*, 443 U. S. 526, 531, n. 5 (1979); *Hunter* v. *Erickson*, 393 U. S., at 390, n. 5. As Justice Harlan noted in *Hunter*, the voters of the polity may express their displeasure through an established legislative or referendum procedure when particular legislation "arouses passionate opposition." *Id.*, at 395 (concurring opinion). Had Akron's fair housing ordinance been defeated at a referendum, for example, "Negroes would undoubtedly [have lost] an important political battle, but they would not thereby [have been] denied equal protection." *Id.*, at 394.

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[28] The United States makes only one attempt to distinguish *Lee* in this regard: *Lee* is inapposite, the United States maintains, because the statute at issue there "blocked desegregation efforts even by 'a school district subject to a pre-existing order to eliminate segregation in its schools,'" and therefore—purportedly in contrast to Initiative 350—"interfere[d] with the efforts of individual school districts to eliminate de jure segregation." Brief for the United States 25, quoting *Lee* v. *Nyquist*, 318 F. Supp., at 715. If by this statement the United States seeks to place the District Court's holding and this Court's affirmance in *Lee* on the ground that the New York statute interfered with Buffalo's attempts to eliminate *de jure* segregation, its submission is simply inaccurate. At the time of the *Lee* litigation, Buffalo had *not* been found guilty of practicing intentional segregation. See *Arthur* v. *Nyquist*, 573 F. 2d 134, 137 (CA2 1978). As the United States notes, Buffalo was under a "pre-existing order to eliminate segregation in its schools"—but that order was issued by the New York Commissioner of Education, because he had found Buffalo's schools *de facto* segregated. *Appeal of Dixon*, 4 N.Y. Educ. Dept. Reports 115 (1965). See *Lee* v. *Nyquist*, 318 F. Supp., at 714–715. *Lee* did not concern *de jure* segregation; it is to be explained only as a straightforward application of the *Hunter* doctrine.

Initiative 350, however, works something more than the "mere repeal" of a desegregation law by the political entity that created it. It burdens all future attempts to integrate Washington schools in districts throughout the State, by lodging decisionmaking authority over the question at a new and remote level of government. Indeed, the initiative, like the charter amendment at issue in *Hunter*, has its most pernicious effect on integration programs that do "*not* arouse extraordinary controversy." *Id.*, at 396 (emphasis in original). In such situations the initiative makes the enactment of racially beneficial legislation difficult, though the particular program involved might not have inspired opposition had it been promulgated through the usual legislative processes used for comparable legislation.[27] This imposes direct and undeniable burdens on minority interests. "If a governmental institution is to be fair, one group cannot always be expected to win," *id.*, at 394; by the same token, one group cannot be subjected to a debilitating and often insurmountable disadvantage.

IV

In the end, appellants are reduced to suggesting that *Hunter* has been effectively overruled by more recent decisions of this Court. As they read it, *Hunter* applied a simple "disparate impact" analysis: it invalidated a facially neutral ordinance because of the law's adverse effects upon racial minorities. Appellants therefore contend that *Hunter* was swept away, along with the disparate impact approach to equal protection, in *Washington* v. *Davis*, 426 U. S. 229 (1976), and *Arlington Heights* v. *Metropolitan Housing Dev. Corp.*, 429 U. S. 252 (1977). Cf. *James* v. *Valtierra*, 402 U. S. 137 (1971).

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[27] That phenomenon is graphically demonstrated by the circumstances of this litigation. The long-standing desegregation programs in Pasco and Tacoma, as well as the Seattle middle school integration plan, have functioned for years without creating undue controversy. Yet they have been swept away, along with the Seattle Plan, by Initiative 350. As a practical matter, it seems most unlikely that proponents of desegregative busing in smaller communities such as Tacoma or Pasco will be able to obtain the statewide support now needed to permit them to desegregate the schools in their communities.

Appellants unquestionably are correct when they suggest that "purposeful discrimination is 'the condition that offends the Constitution,'" *Personnel Administrator of Massachusetts* v. *Feeney*, 442 U. S., at 274, quoting *Swann* v. *Charlotte-Mecklenberg Board of Education*, 402 U. S. 1, 16 (1971), for the "central purpose of the Equal Protection Clause . . . is the prevention of official conduct discriminating on the basis of race." *Washington* v. *Davis*, 426 U. S., at 239. Thus, when facially neutral legislation is subjected to equal protection attack, an inquiry into intent is necessary, to determine whether the legislation in some sense was designed to accord disparate treatment on the basis of racial considerations. Appellants' suggestion that this analysis somehow conflicts with *Hunter*, however, misapprehends the basis of the *Hunter* doctrine. We have not insisted on a particularized inquiry into motivation in all equal protection cases: "A racial classification, regardless of purported motivation, is presumptively invalid and can be upheld only upon an extraordinary justification." *Personnel Administrator of Massachusetts* v. *Feeney*, 442 U. S., at 272. And legislation of the kind challenged in *Hunter* similarly falls into an inherently suspect category.[a]

There is one immediate and crucial difference between *Hunter* and the cases cited by appellants. While decisions such as *Washington* v. *Davis* and *Arlington Heights* considered classifications facially unrelated to race, the charter amendment at issue in *Hunter* dealt in explicitly racial terms with legislation designed to benefit minorities "as minorities," not legislation intended to benefit some larger group of underprivileged citizens among whom minorities were disproportionately represented. This does not mean, of course, that every attempt to address a racial issue gives rise to an impermissible racial classification. See *Crawford* v. *Los Angeles Board of Education, post.* But when the political process or the decisionmaking mechanism used to *address* racially conscious legislation—and only such legislation—is singled out for peculiar and disadvantageous treatment, the governmental action plainly "rests on 'distinctions based on race.'"[29] *James* v. *Valtierra*, 402 U. S., at 141, quoting *Hunter* v. *Erickson*, 393 U. S., at 391. And when the State's allocation of power places unusual burdens on the ability of racial groups to enact legislation specifically designed to overcome the "special condition" of prejudice, the governmental action seriously "curtail[s] the operation of those political processes ordinarily to be relied upon to protect minorities." *United States* v. *Carolene Products Co.*, 304 U. S. 144, 152–153, n. 4 (1938). In a most direct sense, this implicates the judiciary's special role in safeguarding the interests of those groups that are "relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process." *San Antonio School Dist.* v. *Rodriguez*, 411 U. S. 1, 28 (1973).[30]

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[a] The State does not suggest that Initiative 350 furthers the kind of compelling interest necessary to overcome the strict scrutiny applied to explicit racial classifications.

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[29] Thus we do not hold, as the dissent implies, *post*, at 7, that the State's attempt to repeal a desegregation program creates a racial classification, while "identical action" by the Seattle School Board does not. It is the State's race-conscious restructuring of its decisionmaking process that is impermissible, not the simple repeal of the Seattle Plan.

[30] We also note that singling out the political processes affecting racial issues for uniquely disadvantageous treatment inevitably raises dangers of impermissible motivation. When political institutions are more generally restructured, as JUSTICE BRENNAN has noted in another context: "The very breadth of [the] scheme . . . negates any suggestion" of improper purpose. *Walz* v. *Tax Commission*, 397 U. S. 664, 689 (1970) (concurring

Hunter recognized the considerations addressed above, and it therefore rested on a principle that has been vital for over a century—that "the core of the Fourteenth Amendment is the prevention of meaningful and unjustified official distinctions based on race." 393 U. S., at 391. Just such distinctions infected the reallocation of decisionmaking authority considered in *Hunter*, for minorities are no less powerless with the vote than without it when a racial criterion is used to assign governmental power in such a way as to exclude particular racial groups "from effective participation in the political proces[s]." *Mobile* v. *Bolden*, 446 U. S., at 94 (WHITE, J., dissenting). Certainly, a state requirement that "desegregation or anti-discrimination laws," *Crawford* v. *Los Angeles Board of Education*, *post*, at —— (slip op. 10), and only such laws, be passed by unanimous vote of the legislature would be constitutionally suspect. It would be equally questionable for a community to require that laws or ordinances "designed to ameliorate race relations or to protect racial minorities," *id.*, at —— (slip op. 11), be confirmed by popular vote of the electorate as a whole, while comparable legislation is exempted from a similar procedure. The amendment addressed in *Hunter*—and, as we have explained, the legislation at issue here—was less obviously pernicious than are these examples, but was no different in principle.

V

In reaching this conclusion, we do not undervalue the magnitude of the State's interest in its system of education. Washington could have reserved to state officials the right to make all decisions in the areas of education and student assignment. It has chosen, however, to use a more elaborate system; having done so, the State is obligated to operate that

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opinion).

system within the confines of the Fourteenth Amendment. That, we believe, it has failed to do.[31]

Accordingly, the judgment of the Court of Appeals is

Affirmed.

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[31] Appellants also challenge the Court of Appeals' award of attorney's fees to the school district plaintiffs, see n. 12, *supra*, arguing that state-funded entities are not eligible to receive such awards from the State. In our view, this contention is without merit. The districts are plainly parties covered by the language of the fees statutes. See 42 U. S. C. § 1988 (1976 ed., Supp. IV) ("In any action . . . to enforce a provision of sections 1981, 1982, 1983, 1985, and 1986 of this title . . . the court, in its discretion, may allow *the prevailing party, other than the United States*, a reasonable attorney's fee as part of its costs.") (emphasis added); 20 U. S. C. § 3205 (1976 ed., Supp. IV) ("Upon the entry of a final order by a court of the United States against a . . . State . . . for failure to comply with . . . the fourteenth amendment to the Constitution of the United States as [it] pertain[s] to elementary and secondary education, the court, in its discretion . . . may allow *the prevailing party, other than the United States*, a reasonable attorney's fee as part of its costs.") (emphasis added). Nothing in the history of the statutes suggests that this language was meant to exclude state-funded entities. To the contrary, the Courts of Appeals have held with substantial unanimity that publicly-funded legal services organizations may be awarded fees. See, *e. g.*, *Dennis* v. *Chang*, 611 F. 2d 1302 (CA9 1980); *Holley* v. *Lavine*, 605 F. 2d 638 (CA2 1979), cert. denied *sub nom. Blum* v. *Holley*, 446 U. S. 913 (1980); *Lund* v. *Affleck*, 587 F. 2d 75 (CA1 1978). And when it enacted § 1988, Congress cited with approval a decision awarding fees to a state-funded organization. See H.R. Rep. No. 94–1558, p. 8, n. 16 (1976) (citing *Incarcerated Men of Allen County Jail* v. *Fair*, 507 F. 2d 281 (CA6 1974). In any event, the underlying congressional policies are served by awarding fees in cases such as the one before us: no matter what the source of their funds, school boards have limited budgets, and allowing them fees "encourage[s] compliance with and enforcement of the civil rights laws." *Dennis* v. *Chang*, 611 F. 2d, at 1306. See *id.*, at 1306–1307. While appellants suggest that it is incongruous for a State to pay attorney's fees to one of its school boards, it seems no less incongruous that a local board would feel the need to sue the State for a violation of the Fourteenth Amendment. We see no reason to disturb the judgment of the Court of Appeals on this point.

SUPREME COURT OF THE UNITED STATES

No. 81-9

WASHINGTON, ET AL., APPELLANTS *v.* SEATTLE SCHOOL DISTRICT NO. 1 ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

[June 30, 1982]

JUSTICE POWELL, with whom THE CHIEF JUSTICE, JUSTICE REHNQUIST, and JUSTICE O'CONNOR join, dissenting.

The people of the State of Washington, by a two to one vote, have adopted a neighborhood school policy. The policy is binding on local school districts but in no way affects the authority of state or federal courts to order school transportation to remedy violations of the Fourteenth Amendment. Nor does the policy affect the power of local school districts to establish voluntary transfer programs for racial integration or for any other purpose.

In the absence of a constitutional violation, no decision of this Court compels a school district to adopt or maintain a mandatory busing program for racial integration.[1] Accordingly, the Court does not hold that the adoption of a neighborhood school policy by *local* school districts would be unconstitutional. Rather, it holds that the adoption of such a policy at the *State* level—rather than at the local level—violates the Equal Protection Clause of the Fourteenth Amendment.

I dissent from the Court's unprecedented intrusion into the structure of a state government. The School Districts in this case were under no Federal Constitutional obligation to adopt mandatory busing programs. The State of Washington, the governmental body ultimately responsible for the provision of public education, has determined that certain mandatory busing programs are detrimental to the education of its children. "[T]he Fourteenth Amendment leaves the States free to distribute the powers of government as they will between their legislative and judicial branches." *Hughes* v. *Superior Court*, 339 U. S. 460, 467 (1950). In my view, that Amendment leaves the States equally free to decide matters of concern to the State at the State, rather than local, level of government.

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[1] Throughout this dissent, I use the term "mandatory busing" to refer to busing—or mandatory student reassignments—for the purpose of achieving racial integration.

I

At the November, 1978, general election, the voters of the State adopted Initiative 350 by a two to one majority.[2] The Initiative sets forth a neighborhood school policy binding on local school districts. It establishes a general rule prohibiting school districts from "directly or indirectly requir[ing] any student to attend a school other than the school which is geographically nearest or next nearest the student's place of residence." Wash. Rev. Code § 28A.26.010 (1981). The rule may be avoided in individual instances only if the student requires special education; if there are health or safety hazards between the student's residence and the nearest or next nearest school; or if the nearby schools are overcrowded, unsafe, or lacking in physical facilities. *Ibid.*

The Initiative includes two significant limitations upon the scope of its neighborhood school policy. It expressly provides that nothing in the Initiative shall "preclude the establishment of schools offering specialized or enriched educational programs which students may voluntarily choose to attend, or of any other voluntary option offered to students." § 28A.26.050. Moreover, and critical to this case, the authority of state and federal courts to order mandatory school assignments to remedy constitutional violations is left untouched by the Initiative: "This chapter shall not prevent any court of competent jurisdiction from adjudicating constitutional issues relating to the public schools." § 28A.26.060.[3]

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[2] The Initiative passed by almost 66% of the statewide vote. In Seattle the Initiative passed by over 61% of the vote. It failed in only two of Seattle's legislative districts—one predominantly black and one predominantly white.

This suit was filed in United States District Court shortly after the Initiative was enacted. The Seattle School District, joined by the Tacoma and Pasco School Districts[4] and certain individual plaintiffs, argued that the Initiative violated the Equal Protection Clause of the Fourteenth Amendment. The District Court agreed, and, in a split decision, the Court of Appeals affirmed. Relying on *Hunter* v. *Erickson*, 393 U. S. 385 (1969), the Court of Appeals concluded that Initiative 350 "both creates a constitutionally-suspect racial classification and radically restructures the political process of Washington by allowing a state-wide majority to usurp traditional local authority over local school board educational policies." 633 F. 2d, at 1344.[5]

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[3] Unlike the constitutional amendment at issue in *Crawford* v. *Board of Education of the City of Los Angeles* — U. S. — (1982), Initiative 350 places no limits on the State courts in their interpretation of the State Constitution. Thus, if mandatory school assignments were required by the State Constitution—although not by the Fourteenth Amendment of the Federal Constitution—Initiative 350 would not hinder a State from enforcing its Constitution.

[4] Tacoma School District No. 10 and Pasco School District No. 1 are the only other school districts in Washington with extensive integration programs. Pasco has relied upon school closings and mandatory busing to achieve racial integration in its schools. Only minority children are bused under the Pasco plan. 473 F. Supp., at 1002. In addition to school closings, the Tacoma integration plan relies upon voluntary techniques—magnet schools and voluntary transfers.

[5] Judge Wright dissented. In his view Initiative 350 could not be said to embody a racial classification. The Initiative does not classify individuals on the basis of their race. It simply deals with a matter bearing on

II

The principles that should guide us in reviewing the constitutionality of Initiative 350 are well established. To begin with, we have never held, or even intimated, that absent a federal constitutional violation, a State *must* choose to treat persons differently on the basis of race. In the absence of a federal constitutional violation requiring race-specific remedies, a policy of strict racial neutrality by a State would violate no federal constitutional principle. Cf. *University of California Regents* v. *Bakke*, 438 U. S. 265 (1978).

In particular, a neighborhood school policy and a decision *not* to assign students on the basis of their race, does not offend the Fourteenth Amendment.[6] The Court has never

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race relations. Moreover, no racial classification is created because the citizens of a State favor mandatory school reassignments for some purposes but not for reasons of race. The benefits and problems associated with busing for one reason—*e. g.* for racial integration—are not the same as for another—*e. g.* to avoid safety hazards. Finally, Judge Wright could not understand how the exercise of authority by the State could create a racial classification. The State had not intervened by altering the legislative process in a way that burdened racial minorities. Charged by the State Constitution with the responsibility for the provision of public education, the State had simply exercised its authority to run its own school system.

Judge Wright also addressed the District Court's alternative holdings that Initiative 350 is overbroad or that it was motivated by discriminatory intent. He found no basis for either conclusion. These alternative holdings were not addressed by the Court of Appeals majority. Nor are they relied upon by the Court today. Accordingly, they are not discussed in this dissent.

[6] See *Swann* v. *Charlotte-Mecklenburg Bd. of Ed.*, 402 U. S. 1, 28 (1971) ("Absent a constitutional violation there would be no basis for judicially ordering assignment of students on a racial basis. All things being equal, with no history of discrimination, it might well be desirable to assign pupils to schools nearest their homes.").

Indeed, in the absence of a finding of segregation by the School District, mandatory busing on the basis of race raises constitutional difficulties of its own. Extensive pupil transportation may threaten liberty or privacy in-held that there is an affirmative duty to integrate the schools in the absence of a finding of unconstitutional segregation. See *Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U. S. 1, 24 (1971); *Dayton Board of Education* v. *Brinkman*, 433 U. S. 406, 417 (1977). Certainly there is no constitutional duty to adopt mandatory busing in the absence of such a violation. Indeed, even where desegregation is ordered because of a constitutional violation, the Court has never held that racial balance itself is a constitutional requirement. *Ibid.* And even where there have been segregated schools, once desegregation has been accomplished no further constitutional duty exists upon school boards or States to maintain integration. See *Pasadena City Board of Education* v. *Spangler*, 427 U. S. 424 (1976).

Moreover, it is a well established principle that the States have "extraordinarily wide latitude . . . in creating various types of political subdivisions and conferring authority upon them." *Holt Civic Club* v. *Tuscaloosa*, 439 U. S. 60, 71 (1978).[7] The Constitution does not dictate to the States a

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terests. See *University of California Board of Regents* v. *Bakke*, 438 U. S. 265, 300 n. 39 (opinion of POWELL, J.); *Keyes* v. *School District No. 1*, 413 U. S. 189, 240–250 (1973) (POWELL, J., concurring in part and dissenting in part). Moreover, when a State or school board assigns students on the basis of their race, it acts on the basis of a racial classification, and we have consistently held that "[a] racial classification, regardless of purported motivation is presumptively invalid and can be upheld only upon an extraordinary justification." *Personnel Administrator of Massachusetts* v. *Feeney*, 442 U. S. 256, 272 (1979).

[7] "[A]ccording to the institutions of this country, the sovereignty in every State resides in the people of the State, and . . . they may alter and change their form of government at their own pleasure." *Luther* v. *Borden*, 7 How. 1, 47 (1849). See *Community Communications Co.* v. *Boulder*, —— U. S. ——, —— (1982); *Sailors* v. *Board of Education*, 387 U. S. 105, 109 (1967) ("Save and unless the state, county, or municipal government runs afoul of a federally protected right, it has vast leeway in the management of its internal affairs"); *United States* v. *Kagama*, 118 U. S. 375, 379 (1886) (under the Constitution, sovereign authority resides either

particular division of authority between legislature and judiciary or between state and local governing bodies. It does not define institutions of local government.

Thus, a State may choose to run its schools from the state legislature or through local school boards just as it may choose to address the matter of race relations at the State or local level. There is no constitutional requirement that the State establish or maintain local institutions of government or that it delegate particular powers to these bodies. The only relevant constitutional limitation on a State's freedom to order its political institutions is that it may not do so in a fashion designed to "[place] *special* burdens on racial minorities within the governmental process." *Hunter* v. *Erickson*, *supra*, at 391 (emphasis added).

In sum, in the absence of a prior constitutional violation, the States are under no constitutional duty to adopt integration programs in their schools, and certainly they are under no duty to establish a regime of mandatory busing. Nor does the Federal Constitution require that particular decisions concerning the schools or any other matter be made on the local as opposed to the State level. It does not require the States to establish local governmental bodies or to delegate unreviewable authority to them.

III

Application of these settled principles demonstrates the serious error of today's decision—an error that cuts deeply into the heretofore unquestioned right of a State to structure the decisionmaking authority of its government. In this case, by Initiative 350, the State has adopted a policy of racial neutrality in student assignments. The policy in no way interferes with the power of State or Federal Courts to remedy constitutional violations. And if such a policy had been adopted

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with the States or the Federal government, and "[t]here exist . . . but these two").

by any of the school districts in this litigation there could have been no question that the policy was constitutional.[8]

The issue here arises only because the Seattle School District—in the absence of a then established State policy—chose to adopt race specific school assignments with extensive busing. It is not questioned that the District itself, at any time thereafter, could have changed its mind and cancelled its integration program without violating the Federal Constitution. Yet this Court holds that neither the legislature or the people of the State of Washington could alter what the District had decided.

The Court argues that the people of Washington by Initiative 350 created a racial classification, and yet must agree that identical action by the Seattle School District itself would have created no such classification. This is not an easy argument to answer because it seems to make no sense. School boards are the creation of supreme State authority, whether in a State Constitution or by legislative enactment. Until today's decision no one would have questioned the authority of a State to abolish school boards altogether, or to require that they conform to any lawful State policy. And in the State of Washington, a neighborhood school policy would have been lawful.

Under today's decision this heretofore undoubted supreme authority of a State's electorate is to be curtailed whenever a school board—or indeed any other state board or local instrumentality—adopts a race specific program that arguably benefits racial minorities. Once such a program is adopted, *only* the local or subordinate entity that approved it will have authority to change it. The Court offers no authority or relevant explanation for this extraordinary subordination of the ultimate sovereign power of a State to act with respect to racial matters by subordinate bodies. It is a strange notion—alien to our system—that local governmental bodies can forever preempt the ability of a State—the sovereign power—to address a matter of compelling concern to the State. The Constitution of the United States does not require such a bizarre result.

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[8] The Court consistently has held "that the Equal Protection Clause is not violated by the mere repeal of race related legislation or policies that were not required by the Federal Constitution in the first place." *Crawford* v. *Board of Education of the City of Los Angeles*, *supra*, at ——.

This is certainly not a case where a State—in moving to change a locally adopted policy—has established a racially discriminatory requirement. Initiative 350 does not impede enforcement of the Fourteenth Amendment. If a Washington school district should be found to have established a segregated school system, Initiative 350 will place no barrier in the way of a remedial busing order. Nor does Initiative 350 authorize or approve segregation in any form or degree. It is neutral on its face, and racially neutral as public policy. Children of all races benefit from neighborhood schooling, just as children of all races benefit from exposure to "ethnic and racial diversity in the classroom." *Ante*, at ——, quoting *Columbus Board of Education* v. *Penick*, 443 U. S. 449, 486 (1979) (POWELL, J., dissenting).[9]

Finally, Initiative 350 places no "special burdens on racial minorities within the governmental process," *Hunter* v. *Erickson*, *supra*, at 391, such that interference with the State's distribution of authority is justified. Initiative 350 is simply a reflection of the State's political process at work. It does not alter that process in any respect. It does not require, for example, that all matters dealing with race—or with integration in the schools—must henceforth be submitted to a referendum of the people. Cf. *Hunter* v. *Erickson*, *supra*. The State has done no more than precisely what the Court has said that it should do: It has "resolved through the political process" the "desirability and efficacy of [mandatory] school desegregation" where there has been no unlawful segregation. *Ante*, at ——.

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[9] The policies in support of neighborhood schooling are various but all of them are racially neutral. The people of the State legitimately could decide that unlimited mandatory busing places too great a burden on the liberty and privacy interests of families and students of all races. It might decide that the reassignment of students to distant schools, on the basis of race, was too great a departure from the ideal of racial neutrality in State action. And, in light of the experience with mandatory busing in other cities, the State might conclude that such a program ultimately would lead to greater racial imbalance in the schools. See *Estes* v. *Metropolitan Branches of the Dallas NAACP*, 444 U. S. 437, 451 (1980) (POWELL, J., dissenting).

The political process in Washington, as in other States, permits persons who are dissatisfied at a local level to appeal to the State legislature or the people of the State for redress. It permits the people of a State to preempt local policies, and to formulate new programs and regulations. Such a process is inherent in the continued sovereignty of the States. This is our system. Any time a State chooses to address a major issue some persons or groups may be disadvantaged. In a democratic system there are winners and losers. But there is no inherent unfairness in this and certainly no Constitutional violation.[10]

IV

Nonetheless, the Court holds that Initiative 350 "imposes substantial and unique burdens on racial minorities" in the governmental process. See *ante*, at ——. Its authority for this holding is said to be *Hunter* v. *Erickson, supra.*[11] In

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[10] Cf. *James* v. *Valtierra*, 402 U. S. 137, 142 (1971) ("[O]f course a lawmaking procedure that 'disadvantages' a particular group does not always deny equal protection. Under any such holding, presumably a State would not be able to require referendums on any subject unless referendums were required on all, because they would always disadvantage some group. And this Court would be required to analyze governmental structures to determine whether a gubernatorial veto provision or a filibuster rule is likely to 'disadvantage' any of the diverse and shifting groups that make up the American people.").

[11] The Court also relies at certain critical points in its discussion on the

Hunter the people of Akron passed a charter amendment that "not only suspended the operation of the existing ordinance forbidding housing discrimination, but also required the approval of the electors before any future [anti-discrimination] ordinance could take effect." 393 U. S., at 389–390. Although the charter amendment was facially neutral, the Court found that it could be said to embody a racial classification: "[T]he reality is that the law's impact falls on the minority. The majority needs no protection against discrimination." *Id.*, at 391. By making it more difficult to pass legislation in favor of racial minorities, the amendment placed "special burdens on racial minorities within the governmental process." *Ibid.*

Nothing in *Hunter* supports the Court's extraordinary invasion into the State's distribution of authority. Even could it be assumed that Initiative 350 imposed a burden on racial minorities,[12] it simply does not place unique political obstacles in the way of racial minorities. In this case, unlike in *Hunter*, the political system has *not* been redrawn or altered.

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summary affirmance in *Lee* v. *Nyquist*, 318 F. Supp. 710 (WDNY 1970), summarily aff'd, 402 U. S. 935 (1971). As we have often noted, however, summary affirmances by this Court are of little precedential force. See *Metromedia, Inc.* v. *San Diego*, 453 U. S. 490, 500 (1981). A summary affirmance "is not to be read as an adoption of the reasoning supporting the judgment under review." *Zobel* v. *Williams*, —— U. S. ——, —— n. 13 (1982).

[12] It is far from clear that in the absence of a constitutional violation, mandatory busing necessarily benefits racial minorities or that it is even viewed with favor by racial minorities. See *Crawford* v. *Board of Education of the City of Los Angeles*, —— U. S. ——, —— n. 32 (1982). As the Court indicates, the busing question is complex and is best resolved by the political process. *Ante*, at ——.

Moreover, it is significant that Initiative 350 places no limits on voluntary programs or on court ordered reassignments. It permits school districts to order school closings for purposes of racial balance. § 28A.26.030. And it permits school districts to order a student to attend the "next nearest"—rather than nearest—school to promote racial integration.

The authority of the State over the public school system, acting through Initiative or the legislature, is plenary. Thus, the State's political system is not altered when it adopts for the first time a policy, concededly within the area of its authority, for the regulation of local school districts. And certainly racial minorities are not uniquely or comparatively burdened by the State's adoption of a policy that would be lawful if adopted by any School District in the State.[13]

Hunter, therefore, is simply irrelevant. It is the *Court* that by its decision today disrupts the normal course of State government.[14] Under its unprecedented theory of a vested constitutional right to local decisionmaking, the State apparently is now forever barred from addressing the perplexing problems of how best to educate fairly *all* children in a multiracial society where, as in this case, the local school board has acted first.[15]

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[13] The Court repeatedly states that the effect of Initiative 350 is "to redraw decisionmaking authority over racial maters—*and only over racial matters*—in such a way as to place *comparative* burdens on minorities." *Ante*, at ——, n. 17 (emphasis added). But the decision by the State to exercise its authority over the schools and over racial matters in the schools does not place a comparative burden on racial minorities. In *Hunter*, as we have understood it, "fair housing legislation *alone* was subject to an automatic referendum requirement." *Gordon* v. *Lance*, 403 U. S. 1, 5 (1971) (emphasis added). By contrast, Initiative 350 merely places mandatory busing among the much larger group of matters—covering race relations, administration of the schools, and a variety of other matters—addressed at the State level. See note 15, *infra*. Racial minorities, if indeed they are burdened by Initiative 350, are not *comparatively* burdened. In this respect, they are in the same position as any other group of persons who are disadvantaged by regulations drawn at the State level.

[14] The Court's decision intrudes deeply into normal State decisionmaking. Under its holding the people of the State of Washington apparently are forever barred from developing a different policy on mandatory busing where a School District previously has adopted one of its own. This principle would not seem limited to the question of mandatory busing. Thus, if the admissions committee of a State law school developed an affirmative action plan that came under fire, the Court apparently would find it unconstitutional for any higher authority to intervene unless that authority traditionally dictated admissions policies. As a constitutional matter, the Dean of the Law School, the faculty of the University as a whole, the University President, the Chancellor of the University System, and the Board of Regents might be powerless to intervene despite their greater authority under State law.

After today's decision it is unclear whether the State may set policy in any area of race relations where a local governmental body arguably has done "more," than the Fourteenth Amendment requires. If local employment or benefits are distributed on a racial basis to the benefit of racial minorities, the State apparently may not thereafter ever intervene. Indeed, under the Court's theory one must wonder whether—under the Equal Protection component of the Fifth Amendment—even the Federal Government could assert its superior authority to regulate in these areas.

[15] Even accepting the dubious notion that a State must demonstrate some past control over public schooling or race relations before now intervening in these matters, *ante*, at 19, the Court's attempt to demonstrate that Initiative 350 represents a unique thrust by the State into these areas is unpersuasive. The Court's own discussion indicates the comprehensive character of the State's activity. The Common School Provisions of the State's Code of Laws are nearly 200 pages long, governing a broad variety of school matters. The State has taken seriously its constitutional obligation to provide public education. See Art. IX, § 2; *Seattle School District* v. *State*, 90 Wash. 2d 476, 518, 585 P. 2d 71, 95 (1978). In light of the wide range of regulation of the public schools by the State, it is wholly unclear what degree of prior concern or control by the State would satisfy the Court's new doctrine.

In addition to public school affairs generally, the State has taken a direct interest in ending racial discrimination in the schools and elsewhere. See § 49.60.010 *et seq.* Article IX, § 1 of the State Constitution specifically prohibits discrimination in public schools: "It is the paramount duty of the state to make ample provision for the education of all children residing within its borders without distinction or preference on account of race, color, caste, or sex." The State Supreme Court has not interpreted this section of the State Constitution to prohibit race conscious school assignments in the absence of a violation of the Fourteenth Amendment. Cf. *Citizens Against Mandatory Bussing* v. *Palmason*, 80 Wash. 2d 445, 495 P. 2d 657 (1972). But until today's decision one would have thought that the State Court *could* have rendered such a decision without violating the Federal Constitution.

V

We are not asked to decide the wisdom of a State policy that limits the ability of local school districts to adopt—on their own volition—mandatory reassignments for racial balance. We must decide only whether the Federal Constitution permits the State to adopt such a policy. The School Districts in this case were under no federal constitutional obligation to adopt mandatory busing. Absent such an obligation, the State—exercising its sovereign authority over all subordinate agencies—should be free to reject this debatable restriction on liberty. But today's decision denies this right to a State. In this case, it deprives the State of Washington of all opportunity to address the unresolved questions resulting from extensive mandatory busing.[16] The Constitution does not dictate to the States at what level of government decisions affecting the public schools must be taken. It certainly does not strip the States of their sovereignty. It therefore does not authorize today's intrusion into the State's internal structure.[17]

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[16] Responding to this dissent, the Court denies that its opinion limits the authority of the people of the State of Washington and the Legislature to control or regulate school boards. It futher states that "the State remains free to vest all decisionmaking power in state officials, or to remove authority from local school boards in a race-neutral manner." *Ante*, at ——, n. 23. These are puzzling statements that seem entirely at odds with much of the text of the Court's opinion. It will be surprising if officials of the State of Washington—with the one exception mentioned below—will have any clear idea as to what the State now lawfully may do.

The Court does say that "[i]t is the State's race-conscious restructuring of its decisionmaking process that is impermissible, not the simple repeal of the Seattle plan". *Ante*, at ——, n. 29. Apparently the Court is saying that, despite what else may be said in its opinion, the people of the State—or the State legislature—may repeal the *Seattle plan*, even though neither the people nor the legislature validly may prescribe statewide standards. I perceive no logic in—and certainly no constitutional basis for—a distinction between repealing the Seattle plan of mandatory busing and establishing a statewide policy to the same effect. The people of a State have far greater interest in the general problems associated with compelled busing for purpose of integration than in the plan of a single school board.

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[17] As a former school board member for many years, I accept the privilege of a dissenting Justice to add a personal note. In my view, the local school board—responsible to the people of the district it serves—*is* the best qualified agency of a State government to make decisions affecting education within its district. As a policy matter, I would not favor reversal of the Seattle Board's decision to experiment with a reasonable mandatory busing program, despite my own doubts as to the educational or social merit of such a program. See *Estes* v. *Metropolitan Branches of the Dallas NAACP*, 444 U. S. 437, 438–458 (POWELL, J., dissenting). But this case presents a question, not of educational policy or even the merits of busing for racial integration. The question is one of a State's sovereign authority to structure and regulate its own subordinate bodies.

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DEPOSITORY 376

SUPREME COURT OF THE UNITED STATES

Syllabus

CALIFORNIA ET AL. *v.* GRACE BRETHREN CHURCH ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA

No. 81-31. Argued March 30, 1982—Decided June 18, 1982*

The Federal Unemployment Tax Act (FUTA) established a cooperative federal-state scheme to provide benefits to unemployed workers. The Act requires employers to pay an excise tax on wages paid to employees in "covered" employment, but entitles them to a credit on the federal tax for contributions paid into federally approved state unemployment compensation programs. The Act, in 26 U. S. C. § 3309(b), exempts from mandatory state coverage employees of, *inter alia*, "an organization which is operated primarily for religious purposes and which is operated, supervised, controlled, or principally supported by a church or convention or association of churches." A number of California churches and religious schools, including religious schools unaffiliated with any church, brought suit in Federal District Court to enjoin the Secretary of Labor from conditioning his approval of the California unemployment insurance program on its coverage of plaintiffs' employees, and to enjoin the State from collecting both tax information and the state unemployment compensation tax. The District Court conducted various proceedings and issued several opinions and orders extending over almost a year and a half, in one of which proceedings it rejected the Federal Government's argument that the court was barred from granting injunctive relief by the Tax Injunction Act, which provides that district courts "shall not enjoin, suspend or restrain" the assessment or collection of any state tax where "a plain, speedy and efficient remedy" may be had in the courts of such State. Ultimately, as pertinent here, on the ground that the bene-

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*Together with No. 81-228, *United States et al.* v. *Grace Brethren Church et al.*; and No. 81-455, *Grace Brethren Church et al.* v. *United States et al.*, also on appeal from the same court.

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fit entitlement decisions for employees of the religious schools unaffiliated with churches risked excessive entanglement with religion in violation of the Establishment Clause of the First Amendment, the court permanently enjoined the state defendants from collecting unemployment taxes from such schools but did not issue an injunction against the federal defendants as to the schools because it had no information as to what response the Secretary of Labor would make to the court's conclusion that the state defendants could not constitutionally impose state unemployment taxes on the employees of such schools. The court said that if the Secretary instituted decertification proceedings against California for failing to collect the taxes on behalf of such employees, the parties could apply to the court for further relief.

Held:

1. This Court has jurisdiction to hear these appeals under 28 U. S. C. § 1252, which permits appeals to this Court from a federal-court judgment holding an Act of Congress unconstitutional in any civil action to which the United States or any of its agencies, or any officer or employee thereof, is a party. While the District Court did not expressly hold § 3309(b) unconstitutional as applied to religious schools unaffiliated with churches, the effect of its several opinions and orders was to make "the United States or its officers bound by a holding of unconstitutionality." *McLucas* v. *DeChamplain*, 421 U. S. 21, 31. Pp. 10–12.

2. The Tax Injunction Act deprived the District Court of jurisdiction to issue declaratory and injunctive relief. Pp. 12–24.

(a) That Act prohibits declaratory as well as injunctive relief. Because the declaratory judgment procedure "may in every practical sense operate to suspend collection of the state taxes until the litigation is ended," *Great Lakes Dredge & Dock Co.* v. *Huffman*, 319 U. S. 293, 299, the very language of the Act—"suspend or restrain" the assessment or collection of state taxes—suggests that a district court is prohibited from issuing declaratory relief in state tax cases. Moreover, because there is little practical difference between injunctive and declaratory relief, it is unlikely that Congress intended to prohibit taxpayers from seeking one form of relief, while permitting them to seek another, thereby defeating the principal purpose of the Tax Injunction Act "to limit drastically" federal-court interference with the assessment and collection of state taxes. Pp. 13–16.

(b) A state-court remedy is "plain, speedy and efficient" within the meaning of the Tax Injunction Act only if it "provides the taxpayer with a 'full hearing and judicial determination' at which she may raise any and all constitutional objections to the tax." *Rosewell* v. *La Salle National Bank*, 450 U. S. 503, 514. Pp. 17–19.

Syllabus

(c) Here, because the taxpayers in question could seek a refund of their state unemployment insurance taxes through state administrative and judicial procedures, and thereby obtain state judicial review of their constitutional claims, their remedy under state law was "plain, speedy and efficient" within the meaning of the Tax Injunction Act. There is no merit to the taxpayers' argument that the California refund procedures did not constitute a "plain, speedy and efficient remedy" because their First Amendment claims could be effectively remedied only by injunctive relief and that such relief was unavailable in California. First, under California procedures, the taxpayers should be able to challenge the constitutionality of the unemployment tax in state court before extensive entanglement occurs, and state tax collection agencies can be expected to abide by resulting state court rulings. Second, to the extent that any entanglement occurs before state review of the constitutional questions, that entanglement would not be reduced by seeking relief instead in the federal courts. Moreover, to carve out a special exception for taxpayers who raise First Amendment claims would undermine the Tax Injunction Act's primary purpose. Pp. 19–23.

(d) Where the District Court was without jurisdiction, this Court will not consider the merits of the taxpayers' First Amendment claims. *McLucas* v. *DeChamplain*, *supra*, and *Weinberger* v. *Salfi*, 422 U. S. 749, distinguished. Pp. 23–24.

Vacated and remanded.

O'CONNOR, J., delivered the opinion of the Court, in which BURGER, C. J., and BRENNAN, WHITE, MARSHALL, POWELL, and REHNQUIST, JJ., joined. STEVENS, J., filed a dissenting opinion, in which BLACKMUN, J., joined.

NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D.C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

SUPREME COURT OF THE UNITED STATES

NOS. 81-31, 81-228 AND 81-455

CALIFORNIA, ET AL., APPELLANTS
81-31 *v.*
GRACE BRETHREN CHURCH ET AL.

UNITED STATES, ET AL., APPELLANTS
81-228 *v.*
GRACE BRETHREN CHURCH ET AL.

GRACE BRETHREN CHURCH, ET AL., APPELLANTS
81-455 *v.*
UNITED STATES ET AL.

ON APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA

[June 18, 1982]

JUSTICE O'CONNOR delivered the opinion of the Court.

The principal question presented by the parties to this appeal is whether certain state and federal statutes violate the Establishment and Free Exercise Clauses of the First Amendment[1] by requiring religious schools unaffiliated with any church to pay unemployment insurance taxes. We do not reach this substantive question, however, holding instead that the Tax Injunction Act, 28 U. S. C. § 1341,[2] deprived the District Court of jurisdiction to hear these challenges. Accordingly, we vacate the judgment below and dismiss the appeal.

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[1] The First Amendment provides in pertinent part that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." The Free Exercise and Establishment Clauses apply to the States through the Due Process Clause of the Fourteenth Amendment. See *Cantwell* v. *Connecticut*, 310 U. S. 296, 303 (1940); *Everson* v. *Board of Education*, 330 U. S. 1, 15 (1947).

I

Last Term, in *St. Martin Evangelical Lutheran Church* v. *South Dakota*, 451 U. S. 772 (1981), this Court considered statutory and constitutional challenges to provisions of the Federal Unemployment Tax Act (FUTA), 26 U. S. C. §§ 3301–3311 (1976 ed. & Supp. IV). Because the present claims involve the same provisions that we interpreted in *St. Martin*, we recount only briefly the substance and legislative history of the relevant statutes before turning to the facts in the present case.

A

In FUTA,[3] Congress has authorized a cooperative federal-state scheme to provide benefits to unemployed workers. The Act requires employers to pay an excise tax on wages paid to employees in "covered" employment,[4] but entitles them to a credit of up to 90% of the federal tax for contributions they have paid into federally approved state unemployment compensation programs.[5] One of the requirements for federal approval is that state programs "cover" certain broad categories of employment.

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[2] The Act provides:
"The district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State."

[3] FUTA was enacted originally as Title IX of the Social Security Act of 1935, ch. 531, 49 Stat. 639 (1935).

[4] See 26 U. S. C. § 3301.

[5] See 26 U. S. C. § 3302. Each state program receives annual approval after the Secretary of Labor finds that it complies with federal statutory standards. See 26 U. S. C. §§ 3304(a), (c). The federal standards for the state programs are contained in §§ 3304 and 3309. If a state plan complies with federal standards, the State is authorized to receive a federal grant to

Until 1970, § 3306(c)(8) of FUTA excluded from the definition of covered employment "service performed in the employ of a religious, charitable, educational, or other [tax exempt] organization." Pub. L. No. 86–778, § 533, 74 Stat. 984. As a consequence, such organizations were not required to pay either federal excise taxes or state unemployment compensation taxes. In 1970, Congress amended FUTA to require state plans to cover employees of nonprofit organizations, state hospitals, and state institutions of higher education, thus eliminating the broad exemption available to nonprofit organizations.[6] See § 3309(a)(1). At the same time, Congress enacted § 3309(b) to exempt from mandatory state coverage a narrow class of religious and educational employees, *i. e.*, those serving

> "(1) in the employ of (A) a church or convention or association of churches, or (B) an organization which is operated primarily for religious purposes and which is operated, supervised, controlled, or principally supported by a church or convention or association of churches;
>
> "(2) by a duly ordained, commissioned, or licensed minister of a church in the exercise of his ministry or by a member of a religious order in the exercise of duties

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administer the state plan. See 29 U. S. C. § 49d(b); 42 U. S. C. § 501.

[6] See Employment Security Amendments of 1970, Pub. L. No. 91–373, § 104(b)(1), 84 Stat. 697. Under §§ 3309(a)(2) and 3304(a)(6)(B), such nonprofit organizations were given the option of either making the same contribution to the state unemployment compensation fund required of other employers, or reimbursing the fund for unemployment compensation payments actually made to the nonprofit organizations' former employees.

Although nonprofit organizations were covered by federally approved state unemployment compensation laws, they continued to be exempt from the federal excise tax on wages because the definition of "employment" in § 3306(c)(8), excluding services performed for such organizations, remained unchanged.

required by such order;

"(3) in the employ of a school which is not an institution of higher education. . . ." Pub. L. No. 91-373, § 104(b)(1), 84 Stat. 698.

In 1976, Congress again amended FUTA, this time eliminating the substance of § 3309(b)(3), thereby removing the blanket exemption for school employees. See Unemployment Compensation Amendments of 1976, Pub. L. No. 94-566, § 115(b)(1), 90 Stat. 2670.[7] In order to maintain compliance with FUTA, the States promptly amended their corresponding state programs. See, *e. g.*, Cal. Un. Ins. Code § 634.5(a), (b) (West Supp. 1981).

B

The plaintiffs in this case, a number of California churches and religious schools, sought to enjoin the Secretary of Labor from conditioning his approval of the California unemployment insurance program on its coverage of the plaintiffs' employees, and to enjoin the State from collecting both tax information and the state tax.[8] For the purposes of evaluating their statutory and constitutional claims, the District Court divided the plaintiffs into three classes of employers: Category I represents those schools that are part of the corporate structure of a church or association of churches; Category II includes schools that are separate corporations formed by a church or association of churches; and Category III includes schools that are "operated primarily for religious purposes, but which [are] not operated, supervised, controlled or principally supported by a church or convention or association of churches, *i. e.*, an independent, non-church affiliated religious school." Supplemental Opinion, *reprinted in* Jurisdictional Statement of the State of California, *et al.*, Appendix (J.S. App.) at 71.[9]

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[7] In its place, Congress substituted an unrelated provision.

[8] This litigation grew out of two suits, one filed in the District Court by Grace Brethren Church, *et al.* (Case No. CV 79-93 MRP), and the other filed in state court by the Lutheran Church Missouri Synod. The Secretary of Labor successfully removed the *Lutheran Church* case (Case No. CV 79-162 MRP) to the District Court, which consolidated the cases for trial.

On September 21, 1979, the District Court granted a preliminary injunction against the State restraining it from collecting the state unemployment tax from the Category I plaintiffs. See J.S. App. 51. The basis for the court's order was its conclusion that the plaintiffs were exempt from mandatory state coverage under § 3309(b)(1), and alternatively, that if they were not exempt under the terms of FUTA, collection of the tax from the plaintiffs would involve excessive governmental entanglement with religion, in violation of the Establishment Clause of the First Amendment. See J.S. App. 58–65.

In the same opinion, the District Court rejected the Federal Government's argument that, because the state remedy was "plain, speedy and efficient," the Tax Injunction Act, 28 U. S. C. § 1341, barred the court from granting injunctive relief. Considering first the availability of injunctive relief from the state courts, the court concluded that state statutory and constitutional provisions[10] made such relief "at best,

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[9] Category I and II schools comprise schools from the *Lutheran Church* case, see Order (filed April 3, 1981), *reprinted in* J.S. App. 49, as well as some of the schools from the *Grace Brethren* case. See Order (filed April 3, 1981), *reprinted in* J.S. App. 46. Category III schools include only schools from the *Grace Brethren* case. See *ibid.*

[10] Cal. Un. Ins. Code § 1851 (West 1972) provides:

"No injunction or writ of mandate or other legal or equitable process shall issue in any suit, action or proceeding, in any court against this State or against any officer thereof to prevent or enjoin the collection of any contribution sought to be collected under this division."

Cal. Const., Art. XIII, § 32 (West Supp. 1981) provides:

"No legal or equitable process shall issue in any proceeding in any court against this State or any officer thereof to prevent or enjoin the collection uncertain." J.S. App. 66. The court then concluded that a state suit for a refund was an inadequate remedy because the plaintiffs claimed not only that their property had been taken unlawfully, but that the "very process of determining

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of any tax. After payment of a tax claimed to be illegal, an action may be maintained to recover the tax paid, with interest, in such manner as may be provided by the Legislature."

Despite the apparently unambiguous language of these provisions, the District Court considered the availability of injunctive relief only "uncertain" because of state decisions indicating that injunctive relief may be available when the plaintiff challenges the state tax law as being unconstitutional. See *Las Animas & San Joaquin Land Co.* v. *Preciado*, 167 Cal. 580, 587 (1914) (injunction available to restrain a school district from assessing property taxes on land over which it has no authority); *Bueneman* v. *City of Santa Barbara*, 8 Cal. 2d 405, 407 (1937) (statutory provision precluding courts from enjoining execution of public laws for public benefit does not apply to claims that a taxing statute is unconstitutional).

More recent decisions, however, have held injunctive relief to be precluded. See *Modern Barber Colleges, Inc.* v. *California Employment Stabilization Commission*, 31 Cal. 2d 720, 723 (1948) (holding that a provision in the Unemployment Insurance Act, similar to § 1851, prohibited injunctive relief, leaving the taxpayer only with the option to pay the tax and seek a refund); *Aronoff* v. *Franchise Tax Board*, 60 Cal. 2d 177, 180 (1963) (holding Cal. Const. Art. XIII, § 15 and Cal. Rev. & Tax Code § 19081 preclude issuance of an injunction to prevent collection of additional income taxes). Relying on *Aronoff*, a district court of appeal held that Cal. Const. Art. XIII, § 32 (which, in 1974, became the successor to § 15) and the corresponding statutory provision, Cal. Un. Ins. Code § 1851, prohibit the courts from enjoining the collection of unemployment insurance taxes. *Lorco Properties, Inc.* v. *Department of Benefit Payments*, 57 Cal. App. 3d 809, 815 (1976). Recently, in *Pacific Gas & Electric Co.* v. *State Board of Equalization*, 27 Cal. 3d 277, 279 (1980), the California Supreme Court held that under Cal. Const. Art. XIII, § 32 a taxpayer was barred from seeking relief compelling the state tax board to adjust the taxpayer's real property assessments. The court expressly held that there were no equitable exceptions to this rule, *id.*, at 282, and reaffirmed the importance of the state policy to permit the uninterrupted collection of taxes. Cf. *Pacific Motor Transport Co.* v. *State Board of Equalization*, 28 Cal. App. 3d 230, 236 (1972) (noted without approval in *Pacific Gas & Electric Co.* v.

whether any tax is due at all results in a violation of their First Amendment rights." J.S. App. 67. Because this First Amendment injury was "irreparable" once the taxes had been collected, only an injunction against collection of the tax could remedy the plaintiffs' claims. Accordingly, because there existed no "plain, speedy and efficient" remedy in the state courts, the District Court concluded that it had jurisdiction to grant injunctive and declaratory relief.

In a Supplemental Opinion filed June 2, 1980, the court clarified its earlier opinion, stating expressly that the preliminary injunction covered only Category I plaintiffs. See J.S. App. 71. For the same reasons that it had granted the initial preliminary injunction, however, the court extended the preliminary injunction to Category II plaintiffs. The court continued to deny relief to the Category III plaintiffs after concluding that they were not covered by the statutory exemptions in § 3309(b) and that the risk of excessive governmental entanglement with religion was too small to violate the Establishment Clause. J.S. App. 77-79.[11]

Finally, on April 3, 1981, the court filed a Second Supplemental Opinion ruling on all of the plaintiffs' motions for permanent injunctions enjoining the State from collecting unemployment compensation taxes and the Federal Government from conditioning approval of the state unemployment compensation programs on their inclusion of the plaintiffs' employees. See J.S. App. 1. Considering first the statutory claims, the court concluded that Category I and Category II schools, but not Category III schools, are exempt from cov-

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State Board of Equalization, *supra*, and holding that a taxpayer could seek declaratory relief to challenge the validity of a tax regulation, but that such relief could not "'prevent or enjoin' or otherwise hamper present or future tax assessment or collection effort").

[11] The court also rejected the arguments offered by the Category III plaintiffs that imposition of the tax violates the Free Exercise Clause, and that the unique statutory treatment of Category III plaintiffs violates equal protection. J.S. 78.

erage under § 3309(b) of FUTA and the corresponding state provision, Cal. Un. Ins. Code § 634.5(a). J.S. App. 3–15.[12] The court also found that the benefit entitlement decisions for employees of Category III schools risk excessive governmental entanglement with religion in violation of the Establishment Clause of the First Amendment. J.S. App. 25–33.[13] Consequently, the court held that "constitutional considerations bar application of the scheme" to the Category III plaintiffs. *Id.*, at 33.

Based on these findings, the court issued orders permanently enjoining the federal defendants from requiring state unemployment insurance programs to cover Category I and Category II schools as a precondition for federal approval of the state programs, J.S. App. 47, 51, and permanently enjoining the state defendants from "collecting, or attempting to collect, unemployment compensation . . . taxes" from the Category I, II, or III schools. J.S. App. 47, 50. The court expressly held Cal. Un. Ins. Code § 634.5(a) unconstitutional. See J.S. App. 45, 46. The court did not issue an injunction against the federal defendants as to Category III schools because it

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[12] The court held alternatively that if the Secretary of Labor's interpretation of § 3309(b) were correct (*i. e.*, Category I and II schools were not exempt from coverage), then that provision violated the First Amendment because it caused excessive governmental entanglement with religion by requiring "[i]ntrusive monitoring of the activities of employees of religious schools in order to determine whether or not those employees are exempt from unemployment insurance . . . taxes" and by requiring "[i]nvolvement of state officials in the resolution of questions of religious doctrine in the course of determining the benefit eligibility of discharged employees of religious schools." Order (filed April 3, 1982), *reprinted in* J.S. App. 45, 46; Order (filed April 3, 1982), *reprinted in* J.S. App. 49, 50.

[13] The court again rejected the plaintiffs' argument that statutory coverage of Category III schools violates the Free Exercise Clause of the First Amendment, J.S. App. 16–25, and found it unnecessary to reach the Category III plaintiffs' equal protection claim. J.S. App. 35.

> "has no information indicating what response, if any, the Secretary will make to the Court's conclusion that the state defendants may not constitutionally impose the state unemployment compensation tax scheme on the Category 3 employees of non-church affiliated schools. . . . If the Secretary, in response to failure by the state defendants to collect unemployment compensation taxes on behalf of Category 3 employees, institutes decertification proceedings against the State of California, the parties may apply to this Court for further relief." Second Supplemental Opinion *reprinted in* J.S. App. 44 n. 39.

Following issuance of the court's injunction, this Court decided *St. Martin Evangelical Lutheran Church* v. *South Dakota, supra*, holding that § 3309(b)(1)(A) exempts Category I schools from mandatory coverage under the state unemployment insurance programs. Although no Category II schools were before the Court in *St. Martin*, the Court noted in a footnote that

> "To establish exemption from FUTA, a separately incorporated church school (or other organization) must satisfy the requirements of 3309(b)(1)(B): (1) that the organization 'is operated primarily for religious purposes,' and (2) that it is 'operated, supervised, controlled, or principally supported by a church or convention or association of churches.'" 451 U. S., at 782, n. 12.

As a result of this opinion, the Secretary of Labor reconsidered his position and decided that both Category I and Category II schools are statutorily exempt from mandatory coverage under FUTA. Consequently, the federal defendants, as well as the state defendants, have not appealed the District Court's injunction involving Category I and Category II schools, but only that part of the District Court order involving the Category III schools.[14]

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[14] See J.S. 11–12 (No. 81–31); Jurisdictional Statement for the United

II

An initial matter requiring our attention is whether this Court has jurisdiction to hear these appeals.[15] Congress has provided that

> "Any party may appeal to the Supreme Court from an interlocutory or final judgment, decree or order of any court of the United States . . . holding an Act of Congress unconstitutional in any civil action, suit, or proceeding to which the United States or any of its agencies, or any officer or employee thereof, as such officer or employee, is a party." 28 U. S. C. § 1252.

The only possible doubt regarding our appellate jurisdiction under this provision is the requirement that the District Court hold "an Act of Congress unconstitutional."

In *McLucas* v. *DeChamplain*, 421 U. S. 21 (1975), we stated that § 1252 was an unambiguous exception to the policy of minimizing the mandatory docket of this Court. Indeed, the "language of the statute sufficiently demonstrates

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States, *et al.*, at 4, n. 2, 6, n. 5 (No. 81-228). The Category III schools are parties only in the *Grace Brethren* case, the suit originally filed in federal court. See n. 8 *supra*.

The *Grace Brethren* appellees filed a cross appeal (No. 81-455) claiming that the District Court erred in holding that FUTA and the corresponding California statutory provisions do not violate the Free Exercise Clause of the First Amendment. The cross appeal, however, is unnecessary to preserve this argument since under this Court's Rule 10.5 "an appellee, without filing a cross-appeal, [may] defend a judgment on any ground that the law and record permit and that would not expand the relief he has been granted."

The plaintiffs in the *Lutheran Church* case have filed an brief in support of the judgment below. Because, however, neither the State nor the Federal Government appealed from that part of the judgment involving the Lutheran Church plaintiffs, we do not address their claims.

[15] In our order setting these cases for oral argument, we postponed the question of jurisdiction until consideration of the merits. See 454 U. S. —— (1981).

its purpose: to afford immediate review in this Court in civil actions to which the United States or its officers are parties and thus will be bound by a holding of unconstitutionality." *Id.*, at 31. Moreover, this Court has appellate jurisdiction under § 1252 "when the ruling of unconstitutionality is made in the application of the statute to a particular circumstance, . . . rather than upon the challenged statute as a whole." *Fleming* v. *Rhodes*, 331 U. S. 100, 102–103 (1947) (discussing the predecessor to § 1252, Act of Aug. 24, 1937, 50 Stat. 751). See *United States* v. *Christian Echoes National Ministry, Inc.*, 404 U. S. 561, 563 (1972) (per curiam); *United States* v. *Darusmont*, 449 U. S. 292, 293 (1981). Finally, § 1252 provides jurisdiction even though the lower court did not expressly declare a federal statute unconstitutional, so long as a determination that a statutory provision was unconstitutional "was a necessary predicate to the relief" that the lower court granted. *United States* v. *Clark*, 445 U. S. 23, 26 n. 2 (1980).[16]

In the present case, the District Court did not expressly hold § 3309(b) of FUTA unconstitutional as applied to the Category III appellees,[17] but the effect of its several opinions and orders was to make "the United States or its officers . . . bound by a holding of unconstitutionality." *McLucas* v. *DeChamplain*, *supra*, at 31. For example, while discussing the Establishment Clause claim of the Category III schools, the District Court held:

> "Since such entanglement [involving the resolution of

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[16] In *Clark*, the Court of Claims simply ordered relief based on its earlier decision in another case. In that earlier decision, the court had declared the challenged statutory provision unconstitutional. See *Gentry* v. *United states*, 212 Ct. Cl. 1, 546 F. 2d 343 (1976), rehearing denied, 212 Ct. Cl. 27, 551 F. 2d 852 (1977).

[17] See Order (filed April 3, 1981), *reprinted in* J.S. App. 45, 46 (holding Cal. Un. Ins. Code § 634.5(a) unconstitutional, but making no direct reference to § 3309(b)).

> questions of faith and doctrine by secular tribunals] is inevitable during the benefit eligibility determination process if religious schools are brought within the scope of the unemployment compensation tax *scheme*, constitutional considerations bar the *application of the scheme* to them." Second Supplemental Opinion, *reprinted in* J.S. App. 33 (emphasis added).

Examination of other portions of the court's opinion makes clear that the court's use of the word "scheme" refers to the combined federal and state provisions. See *e. g.*, J.S. App. 26 (expressly referring to both federal and state statutory provisions in discussing the "unemployment compensation scheme"); J.S. App. 25 (referring to the intent of Congress and the California legislature in discussing the "unemployment tax scheme"). Moreover, the District Court's analysis leading to its order holding the California provision unconstitutional is based solely on its understanding of the operation and effect of FUTA, which of course prompted the passage of the corresponding state statute in the first place.[18] Cf. *St. Martin Evangelical Lutheran Church* v. *South Dakota*, *supra*, at 780 n. 9 (holding that the Court could review the South Dakota Supreme Court's interpretation of its unemployment compensation tax statute because its "analysis depended entirely on its understanding of the meaning of FUTA and the First Amendment"). Finally, in its Second

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[18] The court's analysis of Category I and II schools also demonstrates that it believed FUTA, as applied to Category III schools, to be unconstitutional. In its discussion of Category I and II schools, the court held that if it were to follow the Secretary's interpretation of § 3309, *i. e.*, if *no* exemption existed, then FUTA would be unconstitutional as applied to those schools in part because of the excessive governmental entanglement in the benefit eligibility hearing. See n. 12, *supra*. Since the court also found an entanglement problem with respect to benefit eligibility hearings for Category III schools, and since there is no statutory exemption for those schools, it follows that the District Court must have believed that FUTA was unconstitutional as applied to the Category III plaintiffs.

Supplemental Opinion, the court made clear that if the Secretary "institutes decertification proceedings against the State of California" for failing to collect unemployment compensation taxes on behalf of Category III employees, "the parties may apply to this Court for further relief," which can only mean injunctive relief against the Secretary. J.S. App. 44 n. 39. Under these circumstances, it is clear that the Secretary is "bound by a holding of unconstitutionality," and that this Court has jurisdiction under § 1252 to hear this appeal.

III

As we noted above, the District Court declared Cal. Un. Ins. Code § 634.5(a) unconstitutional and enjoined the state defendants from collecting state unemployment compensation taxes from the Category III schools.[19] In the course of granting this declaratory and injunctive relief, the court expressly rejected the Federal Government's argument that the Tax Injunction Act, 28 U. S. C. § 1341, deprived the court of jurisdiction. See J.S. App. 65–69. Consequently, before reaching the merits of the appellees' claim, we must decide whether the District Court correctly ruled that it had jurisdiction under the Tax Injunction Act to issue declaratory and injunctive relief.

A

The Tax Injunction Act states simply that the district courts "shall not enjoin, suspend or restrain the . . . collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State." It is plain from this language that the Tax Injunction Act prohibits a federal district court, in most circumstances, from issuing an injunction enjoining the collection of state taxes. Although this Court once reserved the question,[20] we now conclude that the Act also prohibits a district court from issuing a declaratory judgment holding state tax laws unconstitutional.

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[19] No federal tax is involved in this case, for the services performed for Category III schools are exempted by § 3306(c)(8) from the definition of employment for which the federal excise tax must be paid.

Initially, we observe that the Act not only divests the district court of jurisdiction to issue an injunction enjoining state officials, but also of jurisdiction to take actions that "suspend or restrain" the assessment and collection of state taxes. Because the declaratory judgment "procedure may in every practical sense operate to suspend collection of the state taxes until the litigation is ended," *Great Lakes Dredge & Dock Co.* v. *Huffman*, 319 U. S. 293, 299 (1943), the very language of the Act suggests that a federal court is prohibited from issuing declaratory relief in state tax cases.[21] Additionally, because there is little practical difference between injunctive and declaratory relief, we would be hard pressed to conclude that Congress intended to prohibit taxpayers from seeking one form of anticipatory relief against state tax officials in federal court, while permitting them to seek another, thereby defeating the principal purpose of the Tax Injunction Act: "to limit drastically federal district court jurisdiction to interfere with so important a local concern as the collection of taxes." *Rosewell* v. *LaSalle National Bank*, 450 U. S. 503, 522 (1981).[22] As JUSTICE BRENNAN stated in his concurring and dissenting opinion in *Perez* v. *Ledesma*, 401 U. S. 82, 128, n. 17 (1971),

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[20] See *Great Lakes Dredge & Dock Co.* v. *Huffman*, 319 U. S. 293, 299 (1943).

[21] In enacting the Declaratory Judgment Act, Congress recognized the substantial effect declaratory relief would have on legal disputes. Thus, while Congress perceived declaratory judgments as a device to reduce federal court abuses associated with injunctions, Congress also recognized that declaratory relief would "settle controversies," S. Rep. No. 1005, 73d Cong., 2d Sess., 2 (1934), and permit the federal courts "the power to exercise in some instances preventive relief." H.R. Rep. No. 1264, 73d Cong., 2d Sess., 2 (1934).

[22] To be sure, in enacting the Tax Injunction Act, Congress considered primarily injunctions against state officials because that form of anticipa-

"[i]f federal declaratory relief were available to test state

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tory relief was the principal weapon used by businesses to delay or avoid paying state taxes. See *e. g.*, S. Rep. No. 1035, 75th Cong., 1st Sess., 1–2 (1937), 81 Cong. Rec. 1416 (1937) (remarks of Sen. Bone). Moreover, it is arguable that Congress' failure to mention the Declaratory Judgment Act, enacted only three years earlier, indicates that Congress intended the Tax Injunction Act to prohibit only federal injunctive relief. Nevertheless, the legislative history of the Tax Injunction Act demonstrates that Congress worried not so much about the form of relief available in the federal courts, as about divesting the federal courts of jurisidiction to interfere with state tax administration.

Both the Senate and House Reports, as well as the congressional debates of the Act, expressly rely on the congressional purpose underlying the Johnson Act of 1934, 28 U. S. C. § 1342, which divests the district courts of jurisdiction of any suit to "enjoin, suspend, or restrain the operation" of any public utility commission order. See S. Rep. No. 1035, 75th Cong., 1st Sess., 2 (1937); H.R. Rep. No. 1053, 75th Cong., 1st Sess., 2 (1937); 81 Cong. Rec. 1415–1417 (1937) (remarks of Sen. Bone). The legislative history of the Johnson Act, in turn, makes clear that its purpose was to prevent public utilities from going to federal district court to challenge state administrative orders or avoid state administrative and judicial proceedings. See, *e. g.*, S. Rep. No. 125, 73d Cong., 1st Sess., 3 (1933) (in support of the Johnson bill, declaring that a utility "will be required, in all cases where a State has set up a public utility commission, to proceed before that commission if it has any complaint. It can appeal from this State board to the State courts and, if it is dissatisfied with the final judgment of the supreme court of the State, it can take an appeal to the Supreme Court of the United States"); *id.*, at 33 ("It is the jurisdiction which Congress has given to Federal courts to pass on matters of State regulation which holds up the laws of the States, prevents the officials of the States from doing their duty, and robs the people of the benefit which would accrue to them, if the commissions which they have set up by law in the various States were permitted to perform their duty"); H.R. Rep. No. 1194, 73d Cong., 2d Sess., 2 (1934) (in opposition to the Johnson bill, declaring that it "seeks to withdraw completely from the district courts of the United States all jurisdiction in suits relating to orders of State administrative boards or commissions affecting rates chargeable by public utilities"); 78 Cong. Rec. 1916 (1934) (remarks of Sen. Johnson); *id.*, at 1918 ("the object is to make [the tax assessments, state tax administration might be thrown into disarray, and taxpayers might escape the ordinary procedural requirements imposed by state law. During the pendency of the federal suit the collection of revenue under the challenged law might be obstructed, with consequent damage to the State's budget, and perhaps a shift to the State of the risk of taxpayer insolvency. Moreover, federal constitutional issues are likely to turn on questions of state tax law, which, like issues of state regulatory law, are more properly heard in the state courts." See *Fair Assessment in Real Estate Ass'n, Inc.* v. *McNary*, 454 U. S. 100, ——, n. 6 (1981).[23]

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utilities] subject to the jurisdiction of the laws of our States; to give them their rights in every instance to the trial of the question of fact first before the public-utility commission, to give them every legal right they have, and if any right that is guaranteed by the Constitution is infringed upon at all, then, of course, the legal right of appeal ultimately from the highest tribunal in the State to the United States Supreme Court"); *id.*, at 8324 (remarks of Rep. Mapes) ("It is simply a question as to whether or not States are going to be allowed to perform their proper functions in the supervision and fixing of rates, without interference of Federal law. It is a question as to whether or not Congress is going to continue to permit the utilities in important cases to thwart the will of the States and the State authorities. . . . This bill will only deprive the lower Federal courts of the jurisdiction they now have over rate cases"); *id.*, at 8328 (remarks of Rep. Lewis) ("The Johnson bill absolutely abolishes the jurisdiction of the United States courts in rate cases"); *id.*, at 8338 (remarks of Rep. Tarver) ("The Johnson bill contains but one substantive proposition, and that is to divest the district courts of the United States of jurisdiction in public-utility rate cases"); *id.*, at 8419 (remarks of Rep. Hancock) ("the Johnson bill seeks to [save time and money] by divesting the Federal courts of all jurisdiction in public-utility cases except the right of appeal to the Supreme Court of the United States after the final decision of the State court of last resort").

[23] This Court has long recognized the dangers inherent in disrupting the administration of state tax systems. See, *e. g.*, *Dows* v. *City of Chicago*, 11 Wall. 108, 110 (1870) ("It is upon taxation that the several States chiefly rely to obtain the means to carry on their respective governments, and it is

Consequently, because Congress' intent in enacting the Tax Injunction Act was to prevent federal court interference with the assessment and collection of state taxes, we hold that the Act prohibits declaratory as well as injunctive relief. Accordingly, the District Court in this case was without jurisdiction to declare the California tax provision unconstitutional or to issue its injunction against state authorities unless the appellees had no "plain, speedy and efficient remedy" in the state courts.

Last Term, in *Rosewell* v. *LaSalle National Bank*, *supra*, this Court had occasion to consider the meaning of the "plain, speedy and efficient" exception in the Tax Injunction Act. After reviewing previous decisions[24] and the legislative history of the Act,[25] the Court concluded that the "plain, speedy and efficient" exception requires the "state-court remedy [to meet] certain minimal *procedural* criteria." *Id.*, at 512 (emphasis in original). In particular, a state court remedy is "plain, speedy and efficient" only if it "provides the taxpayer with a 'full hearing and judicial determination' at which she may raise any and all constitutional objections to the tax." *Id.*, at 514 (quoting *LaSalle National Bank* v. *County of Cook*, 57 Ill. 2d 318, 324, 312 N.E. 2d 252, 255–256 (1974)).[26]

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of the utmost importance to all of them, that the modes adopted to enforce the taxes levied should be interfered with as little as possible. Any delay in the proceedings of the officers, upon whom the duty is devolved of collecting the taxes, may derange the operations of government, and thereby cause serious detriment to the public").

[24] See *Tully* v. *Griffin, Inc.*, 429 U. S. 68, 74 (1976); *Hillsborough* v. *Cromwell*, 326 U. S. 620, 625 (1946); *Great Lakes Dredge & Dock Co.* v. *Huffman*, 319 U. S. 293, 300–301 (1943).

[25] See 81 Cong. Rec. 1416 (1937) (remarks of Sen. Bone); S. Rep. No. 1035, 75th Cong., 1st Sess., 2 (1937). The Court also relied on the legislative history of the Johnson Act of 1934, 28 U. S. C. § 1342 (prohibiting federal court interference with orders issued by state administrative agencies to public utilities), on which the Tax Injunction Act was modeled.

[26] See also 450 U. S., at 515 and n. 19; 517 (making clear that some opportunity to raise constitutional objections is the most important consider-

Applying these considerations, the *Rosewell* Court held that an Illinois tax scheme, requiring the taxpayer to pay an allegedly unconstitutional tax[27] and seek a refund through state administrative and judicial procedures, was a "plain, speedy and efficient remedy" within the meaning of the Tax Injunction Act. In reaching this holding, the Court specifically relied on legislative reports demonstrating congressional awareness that refunds were the exclusive remedy in many state tax systems.[28]

The holding in *Rosewell* reflects not only Congress' express command in the Tax Injunction Act, but also the historical reluctance of the federal courts to interfere with the operation of state tax systems if the taxpayer had available an adequate remedy in the state courts. As this Court stated in *Dows* v. *City of Chicago*, 11 Wall. 108, 110 (1870), long before enactment of the Tax Injunction Act:

> "No court of equity will . . . allow its injunction to issue to restrain [state officers collecting state taxes], except where it may be necessary to protect the rights of the citizen whose property is taxed, and he has no adequate remedy by the ordinary processes of the law. It must appear that the enforcement of the tax would lead to a multiplicity of suits, or produce irreparable injury, . . . before the aid of a court of equity can be invoked."[29]

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ation); S. Rep. No. 1035, 75th Cong., 1st Sess., 2 (1937) (under the Tax Injunction Act, a "full hearing and judicial determination of the controversy is assured. An appeal to the Supreme Court of the United States is available as in other cases").

[27] The plaintiff in *Rosewell* had claimed that requiring payment of the county property tax violated her equal protection and due process rights.

[28] See S. Rep. 1035, 75th Cong., 1st Sess., 1 (1937) (state "statutes generally provide that taxpayers may contest their taxes only in refund actions after payment under protest"); H.R. Rep. No. 1503, 75th Cong., 1st Sess., 2 (1937).

[29] See also *Boise Artesian Hot and Cold Water Co.* v. *Boise City*, 213 U. S. 276, 282 (1909) (holding that "the illegality or unconstitutionality of a

In order to accomodate these concerns and be faithful to the congressional intent "to limit drastically" federal court interference with state tax systems, we must construe narrowly the "plain, speedy and efficient" exception to the Tax Injunction Act.

With these cases and principles in mind, we turn to the California provisions to determine whether there exists a "plain, speedy and efficient" state remedy for the appellees' claim.

B

There is no dispute that appellees in the present case can seek a refund of the California unemployment tax through state administrative and judicial procedures. Once a taxpayer has sought and been denied a refund from the appropriate state agency, see Cal. Un. Ins. Code §§ 1176–1185 (West 1972 & Supp. 1981),[30] he may file an action in Superior

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state or municipal tax or imposition is not of itself a ground for equitable relief in the courts of the United States. In such a case the aggrieved party is left to his remedy at law, when that remedy is as complete, practicable and efficient as the remedy in equity"); *Singer Sewing Machine Co.* v. *Benedict*, 229 U. S. 481, 488 (1913) (holding that federal courts will not enjoin the collection of unconstitutional state taxes where the taxpayer "ha[s] a plain, adequate and complete remedy" at law); *Great Lakes Dredge & Dock Co.* v. *Huffman*, 319 U. S. 293, 299 (1943) (holding that the same "considerations which have led federal courts of equity to refuse to enjoin the collection of state taxes, save in exceptional cases, require a like restraint in the use of the declaratory judgment procedure"); *Fair Assessment in Real Estate Ass'n, Inc.* v. *McNary*, 454 U. S. 100, —— (1981) (noting that the Tax Injunction Act, "and the decisions of this Court which preceded it, reflect the fundamental principle of comity between federal courts and state governments that is essential to 'Our Federalism,' particularly in the area of state taxation").

[30] Apparently, California taxpayers cannot raise their constitutional challenges in the administrative tax refund proceeding unless an appellate court already has sustained such a challenge. See Cal. Const. Art. III, § 3.5 (West Supp. 1981), which provides in part that

"An administrative agency . . . has no power:

Court for a refund of the taxes paid, raising all arguments against the validity of the tax. Cal. Un. Ins. Code § 1241 (West Supp. 1981). If the taxpayer is unsuccessful at trial, he may appeal the decision to higher state courts and ultimately seek review in this Court. Nothing in this scheme prevents the taxpayer from "rais[ing] any and all constitutional objections to the tax" in the state courts. *Rosewell* v. *LaSalle National Bank*, *supra*, at 514. As the Court in *Rosewell* noted, the "Act contemplates nothing more." *Id.*, at 516, n. 19.[31] Moreover, assuming that the appellees' constitutional claims are meritorious, an issue on which we express no view, there is every reason to believe that once a state appellate court has declared the tax unconstitutional the appropriate state agencies will respect that declaration. See *Pacific Motor Transport Co.* v. *State Bd. of Equalization*, 28 Cal. App. 3d 230, 236 (1972) (noting that while the "relief afforded may not 'prevent or enjoin' or otherwise hamper present or future tax assessment or collection effort . . .

"(a) To declare a statute unenforceable, or refuse to enforce a statute, on the basis of it being unconstitutional unless an appellate court has made a determination that such statute is unconstitutional;

"(b) To declare a statute unconstitutional."

[31] Significantly, the California administrative and judicial scheme for challenging a tax assessment is remarkably similar to the Illinois scheme that we upheld in *Rosewell* as "plain, speedy and efficient." See 450 U. S., at 508–509 and nn. 6–7. In fact, the California tax scheme is more favorable to the taxpayer than the Illinois scheme in that it requires the State to pay interest on improperly collected taxes. See Cal. Un. Ins. Code § 1242 (West Supp. 1981)

This Court has not hesitated to declare a state refund provision inadequate to bar federal relief if the taxpayer's opportunity to raise his constitutional claims in the state proceedings is uncertain. In *Hillsborough* v. *Cromwell*, 326 U. S. 620 (1946), the taxpayer could not raise his constitutional challenge in the administrative proceedings, and appeal to the state courts was discretionary with those courts. Consequently, because "there [was] such uncertainty concerning the New Jersey remedy as to make it speculative," *id.*, at 625, the Court held that the taxpayer could seek declaratory relief in federal court.

[i]t will be presumed that the governmental agency will respect a judicial declaration concerning a regulation's validity"). Accordingly, it appears that *Rosewell* is directly applicable to the present case, and that the District Court had no jurisdiction to hear the appellees' claims.

The appellees contend, however, that the California refund procedures do not constitute a "plain, speedy and efficient remedy" because their claims can be remedied only by injunctive relief, and that such relief is unavailable in California courts to restrain the collection of state taxes. See n. 10 *supra*. Injunctive relief is necessary, the appellees claim, because prior to state judicial review, the employer must meet certain recordkeeping, registration, and reporting requirements, see Cal. Un. Ins. Code §§ 1085, 1086, 1088, 1092, and potentially is subject to administrative benefit eligibility hearings[32] in violation of the appellees' First Amendment rights. The appellees thus fear that their constitutional rights will be violated before they have an opportunity to challenge the constitutionality of the unemployment tax scheme in state court.

This argument is unpersuasive. First, nothing in the California scheme precludes the appellees from challenging the unemployment tax before a benefit eligibility hearing is held for one of their former employees. As soon as an employer makes its first payment to the state unemployment insurance fund, it may file for a refund and, after exhausting state administrative remedies, seek a judicial determination of the constitutionality of the tax.[33] If the employer ultimately prevails on his constitutional argument, the state taxing authorities can be expected to respect that court's holding in future administrative proceedings. See *Pacific Motor Transport Co.* v. *State Board of Equalization*, *supra*, at 236. Thus, before any entanglement from the benefit eligibility hearings occurs, the appellees should be able to challenge the constitutionality of the state unemployment insurance taxes.

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[32] Under Cal. Un. Ins. Code § 1256, a former employee can collect unemployment benefits only if he has not been dismissed for "misconduct" or "left his most recent work voluntarily without good cause."

[33] Part of the appellees' argument for the necessity of injunctive relief rests on the premise that payments to the state fund are made only after a benefit eligibility hearing has been held. Under 26 U. S. C. §§ 3309(a)(2) and 3304(a)(6)(B), however, the States are required to give nonprofit organizations, including the appellees, the option either of making regular con-

Second, while an employer may be subject to some recordkeeping and reporting requirements, or even a benefit eligibility hearing, pending the resolution of its constitutional claims in state court, it will be subject to the same burdens even if it seeks relief from the federal courts. Thus, whatever harm the appellees may suffer pending resolution of their constitutional claims, that harm is not reduced by seeking relief in federal court. Stated differently, there are no apparent advantages to federal court relief that make state court remedies less than "plain, speedy and efficient."[34]

Finally, we must keep in mind that at the time that it passed the Tax Injunction Act, Congress was well aware that refund procedures were the sole remedy in many States for unlawfully collected taxes. See S. Rep. No. 1035, 75th Cong., 1st Sess., 1 (1937); H.R. Rep. No. 1053, 75th Cong., 1st Sess., 2 (1937).[35] Carving out a special exception for tax-

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tributions to the state unemployment insurance fund or of reimbursing the fund for payments actually made to the employers' former employees. The nonprofit organizations are not required to choose the reimbursement method, however, and can make regular payments to the fund in advance of any employee being discharged.

[34] Our conclusion that the state court remedy is plain, speedy and efficient is reenforced by our observation that it took the appellees in this case over two years to obtain injunctive relief in federal court.

[35] The dissent errs when it states, without authority, that the Tax Injunction Act is not applicable to this case because of the "layers of review that must be exhausted in the California system." *Post*, at ——, n. 5. Certainly, nothing in the legislative history of the Act suggests that requiring a taxpayer to seek a refund first through administrative procedures makes the state remedy less than "plain, speedy and efficient." Moreover, the

payers raising First Amendment claims would undermine significantly Congress' primary purpose "to limit drastically federal district court jurisdiction to interfere with so important a local concern as the collection of taxes." *Rosewell* v. *LaSalle National Bank*, *supra*, at 522.[36] Because we do not believe that Congress intended federal injunctions and declaratory judgments to disrupt state tax administration when state refund procedures are available, we decline to find an exception in the Tax Injunction Act for the appellees' claims.[37] Accordingly, because the appellees could seek a refund of their state unemployment insurance taxes, and thereby obtain state judicial review of their constitutional claims, we hold that their remedy under state law was "plain, speedy and efficient" within the meaning of the Tax Injunction Act, and consequently, that the District Court had no jurisdiction to issue injunctive or declaratory relief.[38]

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legislative history of the Johnson Act, after which the Tax Injunction Act was modeled, see n. 22, *supra*, makes clear congressional intent that a state remedy is "plain, speedy and efficient" even though a utility must proceed first through administrative and then judicial proceedings in order to challenge the constitutionality of utility rates. See S. Rep. No. 125, 73d Cong., 1st Sess., 2-3 (1933).

[36] In addition, there seems to be no principled basis for limiting the appellees' argument to First Amendment claims. Any employer required to pay state taxes in a manner allegedly violating the Equal Protection Clause, for example, might argue that the absence of state injunctive relief permitted the infliction of an irreparable injury that could be remedied only by a federal injunction.

[37] We also reject the appellees' argument to the extent that it assumes that the state courts will not protect their constitutional rights. As we stated in another context, "we are unwilling to assume that there now exists a general lack of appropriate sensitivity to constitutional rights in the trial and appellate courts of the several States. State courts, like federal courts, have a constitutional obligation to safeguard personal liberties and to uphold federal law." *Stone* v. *Powell*, 428 U. S. 465, 494 n. 35 (1976).

[38] The state defendants also argue that because the Federal Government is an indispensable party to this action, and could not be compelled to submit to state court jurisdiction, the state courts could not afford the appel-

C

Despite the absence of jurisdiction in the District Court, the federal defendants urge us to consider the merits of the appellees' First Amendment claims because of the "public interest in, and the Secretary's need for, a definitive interpretation of 26 U. S. C. § 3309(b)." Brief for the United States, at 21. The Government bases this argument on our decision in *McLucas* v. *DeChamplain*, 421 U. S. 21, 32 (1975), in which we held that "whether the District Court did or did not have jurisdiction to act, this case is properly here under § 1252." See also *Weinberger* v. *Salfi*, 422 U. S. 749, 763 n. 8 (1975).

The Government's argument is unavailing, however, for in *McLucas* and *Salfi*, *some* federal trial court had jurisdiction,[29]

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lees complete relief. Consequently, the state defendants reason, the Tax Injunction Act does not deprive the District Court of jurisdiction. See Brief for State of California, at 35. The error in this argument is its premise; as *St. Martin Evangelical Lutheran Church* v. *South Dakota*, *supra*, demonstrates, the Federal Government need not be a party in order for the appellees to litigate their statutory and constitutional claims.

Finally, none of the parties suggests that we avoid the jurisdictional bar of the Tax Injunction Act by restricting our review to the appellees' challenge to § 3309(b) of FUTA, and disregarding their challenge to the corresponding state provisions, § 634.5(a), (b). Such a suggestion would be untenable since, after all, the state provisions were enacted in order to comply with federal statutory requirements, and consequently are identically worded to the federal provisions. Thus, a challenge to FUTA would be a direct effort to "enjoin, suspend or restrain" state tax officials from collecting unemployment taxes from the appellees. Alternatively, if the challenge to FUTA would not affect the actions of state officials, there would be serious doubts whether the appellees were injured by FUTA's provisions. Accordingly, we vacate not only the District Court's judgment with respect to the appellees' state claims, but also its judgment regarding the constitutionality of FUTA.

[29] In both of those cases, the question was whether a single district judge or a three-judge district court had jurisdiction. In the present case, by contrast, the issue is whether the federal courts or the state courts have jurisdiction.

whereas in the present case, no federal district court had jurisdiction. If this Court were nonetheless to reach the First Amendment issues presented in this appeal, the litigants would have sidestepped neatly Congress' intent and our longstanding policy "to limit drastically" federal interference in the administration of state taxes when a "plain, speedy and efficient" state remedy is available.[49] Accordingly, we do not reach the appellees' First Amendment claims.

The judgment of the District Court is vacated, and the case remanded for further proceedings consistent with this opinion.

So ordered.

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[49] Similarly, the state defendants' reliance on *Williams* v. *Zbaraz*, 448 U. S. 358 (1980), is misplaced. In that case, the District Court had held unconstitutional a federal statute that the parties had not challenged. We held that because there was no case or controversy on that issue, the District Court had exceeded its jurisdiction for that issue. *Id.*, at 367. Nevertheless, because of the holding of unconstitutionality we concluded that we had jurisdiction under § 1252 to "review the 'whole case.'" *Id.*, at 368. That review, however, was restricted to those issues over which the District Court had had jurisdiction, and we vacated that portion of the judgment holding the federal statute unconstitutional. *Ibid.*

whereas in the present case, no federal district court had jurisdiction [illegible]

[illegible]

[illegible] holding the federal statute unconstitutional. Ibid.

SUPREME COURT OF THE UNITED STATES

Nos. 81-31, 81-228 and 81-455

CALIFORNIA, ET AL., APPELLANTS
81-31 *v.*
GRACE BRETHREN CHURCH ET AL.

UNITED STATES, ET AL., APPELLANTS
81-228 *v.*
GRACE BRETHREN CHURCH, ET AL.

GRACE BRETHREN CHURCH, ET AL., APPELLANTS
81-455 *v.*
UNITED STATES, ET AL.

ON APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA

[June 18, 1982]

JUSTICE STEVENS, with whom JUSTICE BLACKMUN joins, dissenting.

Appellee Grace Brethren Church filed suit against the United States Secretary of Labor and other defendants in the United States District Court for the Central District of California claiming that the Federal Unemployment Tax Act violates the First Amendment to the Federal Constitution. The District Court held the Act unconstitutional. Pursuant to a federal statute providing for expedited review in cases of this kind,[1] the defendants appealed directly to this Court, by-

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[1] 28 U. S. C. § 1252 provides:

"Any party may appeal to the Supreme Court from an interlocutory or final judgment, decree or order of any court of the United States . . . holding an Act of Congress unconstitutional in any civil action, suit, or proceeding to passing the court of appeals precisely as Congress intended. Recognizing the need for prompt review of a constitutional question affecting the nationwide operation of a federal statute, the Court holds that this special jurisdiction was properly invoked. It then reaches the curious conclusion that, because some of the defendants are California taxing authorities that administer this cooperative federal-state program in that State, Congress intended that only *state* courts could pass on the constitutional validity of this *federal* statute.[2] Neither the language nor the legislative history of the Tax Injunction Act requires such a strange result.

The Tax Injunction Act provides that federal district courts "shall not enjoin, suspend, or restrain" the activities of state taxing authorities. The preclusion of federal injunctive relief was a response to a specific problem that concerned Congress in 1937. In the States in which taxpayers were required to challenge a tax assessment in a refund suit, only taxpayers that could sue state taxing authorities in federal court could obtain injunctive relief. The privileged taxpayers were primarily the foreign corporations that could invoke federal diversity jurisdiction. These federal suits were objectionable not only because of this discrimination but also because state treasuries often were deprived of tax revenues while the federal suits were adjudicated and because the federal suits involved only state-law questions that were more appropriate for state-court resolution. See S. Rep. No. 1035, 75th Cong., 1st Sess., 1–2 (1937); 81 Cong. Rec. 1416–1417 (Sen. Bone); see also *Rosewell* v. *LaSalle National*

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which the United States or any of its agencies, or any officer or employee thereof, as such officer or employee, is a party."

[2] A further irony is that the Secretary of Labor, who is certainly the principal defendant even if not an indispensable party, could remove such an action if it were filed in state court. Indeed, with respect to one of the actions consolidated in the District Court, the Secretary did just that.

Bank, 450 U. S. 502, 533 (STEVENS, J., dissenting).

A literal reading of the Tax Injunction Act manifestly does not preclude the declaratory judgment entered in this case. Nor do the concerns that gave rise to its enactment require such a bar. Appellees' challenge is based on the Federal Constitution and is directed at a federal-state program administered according to federal requirements. Only federal questions are involved.

In *Great Lakes Dredge & Dock Co.* v. *Huffman*, 319 U. S. 293, the Court recognized that equitable considerations can in some cases provide adequate justification for federal courts to withhold declaratory relief when the Tax Injunction Act precluded injunctive relief. In the intervening 40 years, this equitable doctrine has been sufficient to protect state tax laws from unnecessary federal interference. Today, however, the Court confronts a situation in which the challenge to a state tax does not implicate these concerns.[3] Ironically, the absence in this unusual case of the traditional justification for a ban on declaratory relief seems to spur the Court to revise the Tax Injunction Act to preclude declaratory as well as injunctive relief. To accomplish this revision, the Court must ignore the plain meaning of the statute and the limited concerns that gave rise to its enactment. The Court instead relies upon the legislative history of the Johnson Act, 48 Stat. 775, see *ante*, at 14, n. 22, even though that statute was enacted before the Declaratory Judgment Act, 48 Stat. 955. Even if that suspect analysis could be overlooked, the fact remains that, after the Declaratory Judgment Act was on the books for three years, Congress did not see fit to bar declaratory relief when it expressly precluded injunctive relief in the Tax Injunction Act. The avoidance of a decision on the merits in this case hardly seems worth the Court's nimble exercise in lawmaking.[4]

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[3] Indeed, to the extent that equitable considerations are implicated they favor the procedure followed in this case whereby expedited review in this Court is available.

The Court has both the power and the duty to decide the merits. I therefore respectfully dissent.

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[4] There is an independent reason why the Tax Injunction Act does not preclude federal declaratory relief in this case. When one compares the layers of review that must be exhausted in the California system with the direct appeal to this Court provided by 28 U. S. C. § 1252, one surely cannot conclude that the state system provides the "plain, speedy, and efficient" remedy that Congress intended for the resolution of the federal questions this case presents.

All issues available have
been filmed.
Unfortunately, any
scattered missing issues
are no longer available.

READEX
FICHE

81/ 81-38

(Slip Opinion)

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Lumber Co.*, 200 U. S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

CRAWFORD ET AL. *v.* BOARD OF EDUCATION OF THE CITY OF LOS ANGELES ET AL.

CERTIORARI TO THE COURT OF APPEAL OF CALIFORNIA, SECOND APPELLATE DISTRICT

No. 81–38. Argued March 22, 1982—Decided June 30, 1982

In a California state-court action seeking desegregation of the schools in the Los Angeles Unified School District (District), the trial court, in 1970, found *de jure* segregation in violation of both the State and Federal Constitutions and ordered the District to prepare a desegregation plan. The California Supreme Court affirmed, but based its decision solely upon the Equal Protection Clause of the State Constitution, which bars *de facto* as well as *de jure* segregation. On remand, the trial court approved a desegregation plan that included substantial mandatory pupil reassignment and busing. While the trial court was considering alternative new plans in 1979, the voters of California ratified an amendment (Proposition I) to the State Constitution which provides that state courts shall not order mandatory pupil assignment or transportation unless a federal court "would be permitted under federal decisional law" to do so to remedy a violation of the Equal Protection Clause of the Fourteenth Amendment to the Federal Constitution. The trial court denied the District's request to halt all mandatory reassignment and busing, holding that Proposition I was not applicable in light of the court's 1970 finding of *de jure* segregation in violation of the Fourteenth Amendment. The court then ordered implementation of a revised plan that again included substantial mandatory pupil reassignment and busing. The California Court of Appeal reversed, concluding that the trial court's 1970 findings of fact would not support the conclusion that the District had violated the Federal Constitution through intentional segregation. The Court of Appeal also held that Proposition I was constitutional under the Fourteenth Amendment and barred that part of the plan requiring mandatory student reassignment and busing.

Held: Proposition I does not violate the Fourteenth Amendment. Pp. 7–17.

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Ju 6.8/b:

(a) This Court's decisions will not support the contention that once a State choses to do "more" than the Fourteenth Amendment requires, it may never recede. Such an interpretation of that Amendment would be destructive of a State's democratic processes and of its ability to experiment in dealing with the problems of a heterogeneous population. Proposition I does not embody, expressly or implicitly, a racial classification. The simple repeal or modification of desegregation or antidiscrimination laws, without more, does not embody a presumptively invalid racial classification. Pp. 7–11.

(b) Proposition I cannot be characterized as something more than a mere repeal. *Hunter* v. *Erickson*, 393 U. S. 385, distinguished. The State Constitution still places upon school boards a greater duty to desegregate than does the Fourteenth Amendment. Nor does Proposition I allocate governmental or judicial power on the basis of a discriminatory principle. A "dual court system"—one for the racial majority and one for the racial minority—is not established simply because civil rights remedies are different from those available in other areas. It was constitutional for the people of the State to determine that the Fourteenth Amendment's standard was more appropriate for California courts to apply in desegregation cases than the standard repealed by Proposition I. Pp. 11–14.

(c) Even if it could be assumed that Proposition I had a disproportionate adverse effect on racial minorities, there is no reason to differ with the state appellate court's conclusion that Proposition I in fact was not enacted with a discriminatory purpose. The purposes of the Proposition —chief among them the educational benefits of neighborhood schooling— are legitimate, nondiscriminatory objectives, and the state court characterized the claim of discriminatory intent on the part of millions of voters as but "pure speculation." Pp. 14–17.

113 Cal. App. 3d 633, 170 Cal. Rptr. 495, affirmed.

POWELL, J., delivered the opinion of the Court, in which BURGER, C. J., and BRENNAN, WHITE, BLACKMUN, REHNQUIST, STEVENS, and O'CONNOR, JJ., joined. BLACKMUN, J., filed a concurring opinion, in which BRENNAN, J., joined. MARSHALL, J., filed a dissenting opinion.

NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D.C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

SUPREME COURT OF THE UNITED STATES

No. 81-38

MARY ELLEN CRAWFORD, A MINOR, ETC., ET AL., PETITIONERS *v.* BOARD OF EDUCATION OF THE CITY OF LOS ANGELES ET AL.

ON WRIT OF CERTIORARI TO THE COURT OF APPEAL OF CALIFORNIA, SECOND APPELLATE DISTRICT

[June 30, 1982]

JUSTICE POWELL delivered the opinion of the Court.

An amendment to the California Constitution provides that state courts shall not order mandatory pupil assignment or transportation unless a federal court would do so to remedy a violation of the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution. The question for our decision is whether this provision is itself in violation of the Fourteenth Amendment.

I

This litigation began almost twenty years ago in 1963, when minority students attending school in the Los Angeles Unified School District (District) filed a class action in state court seeking desegregation of the District's schools.[1] The case went to trial some five years later, and in 1970 the trial court issued an opinion finding that the District was substantially segregated in violation of the State and Federal Constitutions. The court ordered the District to prepare a desegregation plan for immediate use. App. 139.

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[1] In 1980 the District included 562 schools with 650,000 students in an area of 711 square miles. In 1968 when the case went to trial, the District was 53.6% white, 22.6% black, 20% Hispanic, and 3.8% Asian and other. By October 1980 the demographic composition had altered radically: 23.7% white, 23.3% black, 45.3% Hispanic, and 7.7% Asian and other. See *Crawford* v. *Board of Education*, 113 Cal. App. 3d 633, 642 (1980).

On the District's appeal, the California Supreme Court affirmed, but on a different basis. *Crawford* v. *Board of Education*, 17 Cal. 3d 280, 551 P. 2d 28 (1976). While the trial court had found *de jure* segregation in violation of the Fourteenth Amendment of the United States Constitution, see App. 117, 120–121, the California Supreme Court based its affirmance solely upon the Equal Protection Clause of the State Constitution.[2] The court explained that under the California Constitution "state school boards . . . bear a constitutional obligation to take reasonable steps to alleviate segregation in the public schools, whether the segregation be de facto or de jure in origin." 17 Cal. 3d, at 290, 551 P. 2d, at 34. The court remanded to the trial court for preparation of a "reasonably feasible" plan for school desegregation. 17 Cal. 3d, at 310, 551 P. 2d, at 48.[3]

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[2] "The findings in this case adequately support the trial court's conclusion that the segregation in the defendant school district is de jure in nature. We shall explain, however, that we do not rest our decision on this characterization because we continue to adhere to our conclusion in [*Jackson* v. *Pasadena City School Dist.*, 59 Cal. 2d 876, 382 P. 2d 878 (1963)] that school boards in California bear a constitutional obligation to take reasonably feasible steps to alleviate school segregation 'regardless of its cause.'" *Crawford* v. *Board of Education*, 17 Cal. 3d 280, 285, 551 P. 2d 28, 30 (1976). The court explained that federal cases were not controlling: "In focusing primarily on . . . federal decisions . . . defendant ignores a significant line of California decisions, decisions which authoritatively establish that in this state school boards do bear a constitutional obligation to take reasonable steps to alleviate segregation in the public schools, whether the segregation be de facto or de jure in origin." 17 Cal. 3d, at 290, 551 P. 2d, at 33–34.

[3] In stating general principles to guide the trial court on remand, the State Supreme Court discussed the 'busing' question: "While critics have sometimes attempted to obscure the issue, court decisions time and time again emphasized that 'busing' is not a constitutional end in itself but is simply one potential tool which may be utilized to satisfy a school district's constitutional obligation in this field. . . . [I]n some circumstances busing

On remand, the trial court rejected the District's mostly voluntary desegregation plan but ultimately approved a second plan that included substantial mandatory school reassignment and transportation—"busing"—on a racial and ethnic basis.[4] The plan was put into effect in the fall of 1978, but after one year's experience, all parties to the litigation were dissatisfied. See *Crawford* v. *Board of Education*, 113 Cal. App. 3d 633, 636 (1980). Although the plan continued in operation, the trial court began considering alternatives in October 1979.

In November 1979 the voters of the State of California ratified Proposition I, an amendment to the Due Process and Equal Protection Clauses of the State Constitution.[5] Propo-

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will be an appropriate and useful element in a desegregation plan, while in other instances its 'costs,' both in financial and educational terms, will render its use inadvisable." 17 Cal. 3d, at 309, 551 P. 2d, at 47. It noted as well that a state court should not intervene to speed the desegregation process so long as the school board takes "reasonably feasible steps to alleviate school segregation," 17 Cal. 3d, at 305, 551 P. 2d, at 45, and that "a court cannot properly issue a 'busing' order so long as a school district continues to meet its constitutional obligations." 17 Cal. 3d, at 310, 551 P. 2d, at 48.

[4] The plan provided for the mandatory reassignment of approximately 40,000 students in the fourth through eighth grades. Some of these children were bused over long distances requiring daily round-trip bus rides of as long as two to four hours. In addition, the plan provided for the voluntary transfer of some 30,000 students.

Respondent Bustop, Inc. unsuccessfully sought to stay implementation of the plan. See *Bustop, Inc.* v. *Board of Education*, 439 U. S. 1380 (1978) (REHNQUIST, J., in chambers); *Bustop, Inc.* v. *Board of Education*, 439 U. S. 1384 (1978) (POWELL, J., in chambers).

[5] Proposition I was placed before the voters following a two-thirds vote of each house of the state legislature. Cal. Const. art. 18, § 1. The state senate approved the Proposition by a vote of 28 to 6, the state assembly by a vote of 62 to 17. The voters favored the Proposition by a vote of 2,433,312 (68.6%) to 1,112,923 (31.4%). The Proposition received a majority of the vote in each of the State's 58 counties and in 79 of the State's 80 assembly districts. California Secretary of State, Statement of the Vote,

sition I conforms the power of state courts to order busing to that exercised by the federal courts under the Fourteenth Amendment:

> "[N]o court of this state may impose upon the State of California or any public entity, board, or official any obligation or responsibility with respect to the use of pupil school assignment or pupil transportation, (1) except to remedy a specific violation by such party that would also constitute a violation of the Equal Protection Clause of the 14th Amendment to the United States Constitution, and (2) unless a federal court would be permitted under federal decisional law to impose that obligation or responsibility upon such party to remedy the specific violation of the Equal Protection Clause. . . ."[6]

November 6, 1979 Election, 3–4, 43–49.

[6] Proposition I added a lengthy proviso to art. 1, § 7(a) of the California Constitution. Following passage of Proposition I, § 7 now provides, in relevant part:

"(a) A person may not be deprived of life, liberty, or property without due process of law or denied equal protection of the laws; provided, that nothing contained herein or elsewhere in this Constitution imposes upon the State of California or any public entity, board, or official any obligations or responsibilities which exceed those imposed by the Equal Protection Clause of the 14th Amendment to the United States Constitution with respect to the use of pupil school assignment or pupil transportation. In enforcing this subdivision or any other provision of this Constitution, no court of this state may impose upon the State of California or any public entity, board, or official any obligation or responsibility with respect to the use of pupil school assignment or pupil transportation, (1) except to remedy a specific violation by such party that would also constitute a violation of the Equal Protection Clause of the 14th Amendment to the United States Constitution, and (2) unless a federal court would be permitted under federal decisional law to impose that obligation or responsibility upon such party to remedy the specific violation of the Equal Protection Clause of the 14th Amendment of the United States Constitution.

. . . . .

"Nothing herein shall prohibit the governing board of a school district from voluntarily continuing or commencing a school integration plan after

Following approval of Proposition I, the District asked the Superior Court to halt all mandatory reassignment and busing of pupils. App. 185. On May 19, 1980, the court denied the District's application. The court reasoned that Proposition I was of no effect in this case in light of the court's 1970 finding of de jure segregation by the District in violation of the Fourteenth Amendment. Shortly thereafter, the court ordered implementation of a revised desegregation plan, one that again substantially relied upon mandatory pupil reassignment and transportation.[7]

The California Court of Appeal reversed. 113 Cal. App. 3d 633 (1980). The court found that the trial court's 1970 findings of fact would not support the conclusion that the District had violated the Federal Constitution through intentional segregation.[8] Thus, Proposition I was applicable to the trial

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the effective date of this subdivision as amended.

"In amending this subdivision, the Legislature and people of the State of California find and declare that this amendment is necessary to serve compelling public interests, including those of making the most effective use of the limited financial resources now and prospectively available to support public education, maximizing the educational opportunities and protecting the health and safety of all public school pupils, enhancing the ability of parents to participate in the educational process, preserving harmony and tranquility in this state and its public schools, preventing the waste of scarce fuel resources, and protecting the environment."

[7] The Superior Court ordered the immediate implementation of the revised plan. The District was unsuccessful in its effort to gain a stay of the plan pending appeal. See *Board of Education* v. *Superior Court*, 448 U. S. 1343 (1980) (REHNQUIST, J., in chambers).

[8] "When the 1970 findings of the trial court are reviewed in the light of the correct applicable federal law, it is apparent that no specific segregative intent with discriminatory purpose was found. The thrust of the findings of the trial court was that passive maintenance by the Board of a neighborhood school system in the face of widespread residential racial imbalance amounted to de jure segregation in violation of the Fourteenth Amendment. . . . But a school board has no duty under the Fourteenth Amendment to meet and overcome the effect of population movements." *Crawford* v. *Board of Education*, *supra*, 113 Cal. App. 3d, at 645–646.

court's desegregation plan and would bar that part of the plan requiring mandatory student reassignment and transportation. Moreover, the court concluded that Proposition I was constitutional under the Fourteenth Amendment. *Id.*, at 654. The court found no obligation on the part of the State to retain a greater remedy at state law against racial segregation than was provided by the Federal Constitution. *Ibid.* The court rejected the claim that Proposition I was adopted with a discriminatory purpose. *Id.*, at 654–655.[9]

Determining Proposition I to be applicable and constitutional, the Court of Appeal vacated the orders entered by the Superior Court. The California Supreme Court denied hearing. App. to Pet. for Cert. C.[10] We granted certiorari. — U. S. — (1981).

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[9] The Court of Appeal also rejected the claim that Proposition I deprived minority children of a "vested right" to desegregated education in violation of due process. See 113 Cal. App. 3d, at 655–656. Petitioners no longer advance this claim.

[10] On March 16, 1981, the District directed that mandatory pupil reassignment under the Superior Court's revised plan be terminated on April 20, 1981. On that date, parents of children who had been reassigned were given the option of returning their children to neighborhood schools. According to respondent, approximately 7,000 pupils took this option of whom 4,300 were minority students. Brief for Respondent, 10.

The state courts refused to enjoin termination of the plan. On April 17, 1980, however, the United States District Court for the Central District of California issued a temporary restraining order preventing termination of the plan. *Los Angeles NAACP* v. *Los Angeles Unified School District*, 513 F. Supp. 717 (CD Cal. 1981). The District Court found that there was a "fair chance" that intentional segregation by the District could be demonstrated. *Id.*, at 720. The District Court's order was vacated on the following day by the United States Court of Appeals for the Ninth Circuit. *Los Angeles Unified School District* v. *District Court*, 650 F. 2d 1004 (CA9 1981). On remand the District Court denied the District's motion to dismiss. This ruling has been certified for interlocutory appeal. See Brief for Respondents 10, n. 4.

On September 10, 1981, the Superior Court approved a new, voluntary desegregation plan.

II

We agree with the California Court of Appeal in rejecting the contention that once a State chooses to do "more" than the Fourteenth Amendment requires, it may never recede.[11] We reject an interpretation of the Fourteenth Amendment so destructive of a state's democratic processes and of its ability to experiment. This interpretation has no support in the decisions of this Court.

Proposition I does not inhibit enforcement of any federal law or constitutional requirement. Quite the contrary, by its plain language the Proposition seeks only to embrace the requirements of the Federal Constitution with respect to mandatory school assignments and transportation. It would be paradoxical to conclude that by adopting the Equal Protection Clause of the Fourteenth Amendment, the voters of the State thereby had violated it. Moreover, even after Proposition I, the California Constitution still imposes a greater duty of desegregation than does the Federal Constitution. The state courts of California continue to have an obligation under state law to order segregated school districts to use voluntary desegregation techniques, whether or not there has been a finding of intentional segregation. The school districts themselves retain a state law obligation to take reasonably feasible steps to desegregate, and they remain free to adopt reassignment and busing plans to effectuate desegregation.[12]

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[11] Respondent Bustop, Inc. argues that far from doing "more" than the Fourteenth Amendment requires, the State actually violated the amendment by assigning students on the basis of race when such assignments were not necessary to remedy a federal constitutional violation. See Brief for Respondent 10–18. We do not reach this contention.

[12] In this respect this case differs from the situation presented in *Washington* v. *Seattle School District No. 1*, —— U. S. —— (1982).

In an opinion delivered after Proposition I was enacted, the California Supreme Court stated that "the amendment neither releases school districts from their State Constitutional obligation to take reasonably feasible

Nonetheless, petitioners contend that Proposition I is unconstitutional on its face. They argue that Proposition I employs an "explicit racial classification" and imposes a "race-specific" burden on minorities seeking to vindicate state created rights. By limiting the power of state courts to enforce the state created right to desegregated schools, petitioners contend, Proposition I creates a "dual court system" that discriminates on the basis of race.[13] They emphasize that other state created rights may be vindicated by the state courts without limitation on remedies. Petitioners argue that the "dual court system" created by Proposition I is unconstitutional unless supported by a compelling state interest.

We would agree that if Proposition I employed a racial classification it would be unconstitutional unless necessary to further a compelling state interest. "A racial classification, regardless of purported motivation is presumptively invalid and can be upheld only upon an extraordinary justification." *Personnel Administrator of Massachusetts* v. *Feeney*, 442 U. S. 256, 272 (1979). See *McLaughlin* v. *Florida*, 379 U. S. 184, 196 (1964). But Proposition I does not embody a racial classification.[14] It neither says nor implies that persons are to be treated differently on account of their race. It

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steps to alleviate segregation regardless of its cause, nor divests California courts of authority to order desegregation measures other than pupil school assignment or pupil transportation." *McKinny* v. *Oxnard Union High School District Board of Trustees*, —— Cal. 3d ——, —— P. 2d —— (1982) (Slip. op. at 13–14). Moreover, the Proposition only limits state courts when enforcing the State Constitution. Thus, the Proposition would not bar state court enforcement of state *statutes* requiring busing for desegregation or for any other purpose. Cf. *Brown* v. *Califano*, 627 F. 2d 1221, 1230 (CADC 1980) (legislation limiting power of federal agency to require busing by local school boards held constitutional in view of the "effective avenues for desegregation" left open by the legislation).

[13] "[I]t is racial discrimination in the judicial apparatus of the state, not racial discrimination in the state's schools, that petitioners challenge under the Fourteenth Amendment in this case." Brief for Petitioner 48.

[14] In *Hunter* v. *Erickson*, 393 U. S. 385 (1969), the Court invalidated a

simply forbids state courts from ordering pupil school assignment or transportation in the absence of a Fourteenth Amendment violation. The benefit it seeks to confer—neighborhood schooling—is made available regardless of race in the discretion of school boards.[15] Indeed, even if Proposition I had a racially discriminatory effect, in view of the demographic mix of the District it is not clear which race or races would be affected the most or in what way.[16] In addition, this Court previously has held that even when a neutral law has a disproportionately adverse effect on a racial minority, the Fourteenth Amendment is violated only if a discriminatory purpose can be shown.[17]

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city charter amendment which placed a special burden on racial minorities in the political process. The Court considered that although the law was neutral on its face, "the reality is that the law's impact falls on the minority." In light of this reality and the distortion of the political process worked by the charter amendment, the Court considered that the amendment employed a racial classification despite its facial neutrality. In this case the elements underlying the holding in *Hunter* are missing. See *infra*.

[15] A neighborhood school policy does not offend the Fourteenth Amendment in itself. See *Swann* v. *Charlotte-Mecklenburg Bd. of Ed.*, 402 U. S. 1, 28 (1971) ("Absent a constitutional violation there would be no basis for judicially ordering assignment of students on a racial basis. All things being equal, with no history of discrimination, it might well be desirable to assign pupils to schools nearest their homes."). Cf. 20 U. S. C. § 1701: "(a) The Congress declares it to be the policy of the United States that—(1) all children enrolled in public schools are entitled to equal educational opportunity without regard to race, color, sex, or national origin; and (2) the neighborhood is the appropriate basis for determining public school assignments."

[16] In the Los Angeles school district, white students are now the racial minority, see note 1, *supra*. Similarly, in Los Angeles County, racial minorities, including those of Spanish origin, constitute the majority of the population. See 1980 Census of Population and Housing, Advance Reports 6.

[17] See *Washington* v. *Davis*, 426 U. S. 229, 238–248 (1976); *Arlington Heights* v. *Metropolitan Housing Dev. Corp.*, 429 U. S. 252, 265 (1977); *James* v. *Valtierra*, 402 U. S. 137, 141 (1971).

Similarly, the Court has recognized that a distinction may exist between state action that discriminates on the basis of race and state action that addresses, in neutral fashion, race related matters.[18] This distinction is implicit in the Court's repeated statement that the Equal Protection Clause is not violated by the mere repeal of race related legislation or policies that were not required by the Federal Constitution in the first place. In *Dayton Bd. of Education* v. *Brinkman*, 433 U. S. 406, 414 (1977), we found that the school board's mere repudiation of an earlier resolution calling for desegregation did not violate the Fourteenth Amendment.[19] In *Reitman* v. *Mulkey*, 387 U. S. 369, 376 (1967), and again in *Hunter* v. *Erickson*, *supra*, at 390, n. 5 (1969), we were careful to note that the laws under review did more than "mere[ly] repeal" existing anti-discrimination legislation.[20] In sum, the simple repeal or modification of desegregation or anti-discrimination laws, without more, never has been viewed as embodying a presumptively invalid racial classification.[21]

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[18] Proposition I is not limited to busing for the purpose of racial desegregation. It applies neutrally to "pupil school assignment or pupil transportation" in general. Even so, it is clear that court ordered busing in *excess* of that required by the Fourteenth Amendment, as one means of desegregating schools, prompted the initiation and probably the adoption of Proposition I.

[19] See *Dayton Bd. of Ed.* v. *Brinkman*, 443 U. S. 526, 531, n. 5 (1979) ("Racial imbalance, we noted in *Dayton I*, is not *per se* a constitutional violation, and rescission of prior resolutions proposing desegregation is unconstitutional only if the resolutions were required in the first place by the Fourteenth Amendment.").

[20] In *Hunter* we noted that "we do not hold that mere repeal of an existing [anti-discrimination] ordinance violates the Fourteenth Amendment." 393 U. S., at 390, n. 5. In *Reitman* the Court held that California Proposition 14 was unconstitutional under the Fourteenth Amendment not because it repealed two pieces of anti-discrimination legislation, but because the Proposition involved the State in private racial discrimination: "Here we are dealing with a provision which does not just repeal an existing law forbidding private racial discriminations. Section 26 was intended to authorize, and does authorize, racial discrimination in the housing market." 387 U. S., at 380–381.

Were we to hold that the mere repeal of race related legislation is unconstitutional, we would limit seriously the authority of States to deal with the problems of our heterogeneous population. States would be committed irrevocably to legislation that has proven unsuccessful or even harmful in practice. And certainly the purposes of the Fourteenth Amendment would not be advanced by an interpretation that discouraged the States from providing greater protection to racial minorities.[22] Nor would the purposes of the Amendment be furthered by requiring the States to maintain legislation designed to ameliorate race relations or to protect racial minorities but which has produced just the opposite effects.[23] Yet these would be the results of requiring a State to maintain legislation that has proven unworkable or harmful when the State was under no obligation to adopt the legislation in the first place. Moreover, and relevant to this case, we would not interpret the Fourteenth Amendment to require the people of a State to adhere to a judicial construction of their State Constitution when that Constitution itself vests final authority in the people.

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[21] Of course, if the purpose of repealing legislation is to disadvantage a racial minority, the repeal is unconstitutional for this reason. See *Reitman* v. *Mulkey*, 387 U. S. 369 (1967).

[22] See *Palmer* v. *Thompson*, 403 U. S. 217, 228 (1971) ("To hold . . . that every public facility or service, once opened, constitutionally 'locks in' the public sponsor so that it may not be dropped . . . would plainly discourage the expansion and enlargement of needed services in the long run") (BURGER, C. J., concurring); *Reitman* v. *Mulkey*, *supra*, at 395 ("Opponents of state antidiscrimination statutes are now in a position to argue that such legislation should be defeated because, if enacted, it may be unrepealable") (Harlan, J., dissenting).

[23] In his dissenting opinion in *Reitman* v. *Mulkey*, *supra*, at 395, Justice Harlan remarked upon the need for legislative flexibility when dealing with the "delicate and troublesome problems of race relations." He noted:

> "The lines that have been and must be drawn in this area, fraught as it is with human sensibilities and frailties of whatever race or creed, are difficult ones. The drawing of them requires understanding, patience, and compromise, and is best done by legislatures rather than by courts. When legislation in this field is unsuccessful there should be wide opportunities for legislative amendment, as well as for change through such processes as the popular initiative and referendum." *Id.*, at 395–396.

III

Petitioners seek to avoid the force of the foregoing considerations by arguing that Proposition I is not a "mere repeal." Relying primarily on the decision in *Hunter* v. *Erickson*, *supra*, they contend that Proposition I does not simply repeal a state created right but fundamentally alters the judicial system so that "those seeking redress from racial isolation in violation of state law must be satisfied with less than full relief from a state court."[24] We do not view *Hunter* as controlling here, nor are we persuaded by petitioners' characterization of Proposition I as something more than a mere repeal.

In *Hunter* the Akron city charter had been amended by the voters to provide that no ordinance regulating real estate on the basis of race, color, religion, or national origin could take effect until approved by a referendum. As a result of the charter amendment, a fair housing ordinance, adopted by the City Council at an earlier date, was no longer effective. In holding the charter amendment invalid under the Fourteenth Amendment, the Court held that the charter amendment was not a simple repeal of the fair housing ordinance. The amendment "not only suspended the operation of the existing ordinance forbidding housing discrimination, but also required the approval of the electors before any future [antidiscrimination] ordinance could take effect." 393 U. S., at

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[24] Tr. of Oral Argument 6. See *id.*, at 7–8 ("The fact that a state may be free to remove a right or remove a duty, does not mean that it has the same freedom to leave the right in place but simply, in a discriminatory way we argue, provide less than full judicial remedy").

389–390. Thus, whereas most ordinances regulating real property would take effect once enacted by the City Council, ordinances prohibiting racial discrimination in housing would be forced to clear an additional hurdle.[25] As such, the charter amendment placed an impermissible, "special burden[] on racial minorities within the governmental process." *Id.*, at 391.[26]

Hunter involved more than a "mere repeal" of the fair housing ordinance; persons seeking anti-discrimination housing laws—presumptively racial minorities—were "singled out for mandatory referendums while no other group . . . face[d] that obstacle." *James* v. *Valtierra*, *supra*, at 142. By contrast, even on the assumption that racial minorities benefitted from the busing required by state law, Proposition I is less than a "repeal" of the California Equal Protection Clause. As noted above, after Proposition I, the State Constitution still places upon school boards a greater duty to desegregate than does the Fourteenth Amendment.

Nor can it be said that Proposition I distorts the political process for racial reasons or that it allocates governmental or judicial power on the basis of a discriminatory principle. "The Constitution does not require things which are different in fact or opinion to be treated in law as though they were the same." *Tigner* v. *Texas*, 310 U. S. 141, 147 (1940). Remedies appropriate in one area of legislation may not be desirable in another. The remedies available for violation of the antitrust laws, for example, are different than those available for violation of the Civil Rights Acts. Yet a "dual court system"—one for the racial majority and one for the racial minority—is not established simply because civil rights remedies are different from those available in other areas.[27] Surely it was constitutional for the California Supreme Court to caution that although "in some circumstances busing will be an appropriate and useful element in a desegregation plan," in other circumstances "its 'costs,' both in financial and educational terms, will render its use inadvisable." See note 3, *supra*. It was equally constitutional for the people of the State to determine that the standard of the Fourteenth Amendment was more appropriate for California courts to apply in desegregation cases than the standard repealed by Proposition I.[28]

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[25] "In the case before us . . . the city of Akron has not attempted to allocate governmental power on the basis of any general principle. Here, we have a provision that has the clear purpose of making it more difficult for certain racial and religious minorities to achieve legislation that is in their interest." 393 U. S., at 395 (Harlan, J., concurring).

[26] The *Hunter* Court noted that although "the law on its face treats Negro and white, Jew and gentile in an identical manner," 393 U. S., at 391, a charter amendment making it more difficult to pass anti-discrimination legislation could only disadvantage racial minorities in the governmental process.

In short, having gone beyond the requirements of the Federal Constitution, the State was free to return in part to the standard prevailing generally throughout the United States. It could have conformed its law to the Federal Constitution in every respect. That it chose to pull back only in part, and by preserving a greater right to desegregation than exists under the Federal Constitution, most assuredly does not render the Proposition unconstitutional on its face.

IV

The California Court of Appeal also rejected petitioners' claim that Proposition I, if facially valid, was nonetheless unconstitutional because enacted with a discriminatory purpose. The court reasoned that the purposes of the Proposition were well stated in the Proposition itself.[29] Voters may have been motivated by any of these purposes, chief among them the educational benefits of neighborhood schooling. The Court found that voters also may have considered that the extent of mandatory busing, authorized by state law, actually was aggravating rather than ameliorating the desegregation problem. See note 1, *supra*. It characterized petitioners' claim of discriminatory intent on the part of millions of voters as but "pure speculation." 113 Cal. App. 3d, at 655.

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[27] Petitioners contend that Proposition I only restricts busing for the purpose of racial discrimination. The Proposition is neutral on its face, however, and respondents—as well as the State in its amicus brief—take issue with petitioners' interpretation of the provision.

[28] Similarly, a "dual constitution" is not established when the State chooses to go beyond the requirements of the Federal Constitution in some areas but not others. Nor is a "dual executive branch" created when an agency is given enforcement powers in one area but not in another. Cf. *Brown* v. *Califano*, 627 F. 2d 1221 (CADC 1980) (upholding federal legislation prohibiting a federal executive agency, but not local school officials or federal courts, from requiring busing).

In *Reitman* v. *Mulkey*, 387 U. S. 369 (1967), the Court considered the constitutionality of another California Proposition. In that case, the California Supreme Court had concluded that the Proposition was unconstitutional because it gave the State's approval to private racial discrimination. This Court agreed, deferring to the findings made by the California court. The Court noted that the California court was "armed . . . with the knowledge of the facts and circumstances concerning the passage and potential impact" of the Proposition and "familiar with the milieu in which that provision would operate." *Id.*, at 378. Similarly, in this case, again involving the circumstances of passage and the potential impact of a Proposition adopted at a state-wide election, we see no reason to differ with the conclusions of the state appellate court.[30]

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[29] The Proposition contains its own statement of purpose:

"[T]he Legislature and people of the State of California find and declare that this amendment is necessary to serve compelling public interests, including those of making the most effective use of the limited financial resources now and prospectively available to support public education, maximizing the educational opportunities and protecting the health and safety of all public school pupils, enhancing the ability of parents to participate in the educational process, preserving harmony and tranquility in this state and its public schools, preventing the waste of scarce fuel, resources, and protecting the environment."

[30] Cf. *Washington* v. *Davis*, 426 U. S. 229, 253 (1976) ("The extent of

Under decisions of this Court, a law neutral on its face still may be unconstitutional if motivated by a discriminatory purpose. In determining whether such a purpose was the motivating factor, the racially disproportionate effect of official action provides "an important starting point." *Personnel Administrator of Massachusetts* v. *Feeney*, 442 U. S. 256, 274 (1979), quoting *Arlington Heights* v. *Metropolitan Housing Dev. Corp.*, *supra*, 429 U. S. 252, at 266.

Proposition I in no way purports to limit the power of state courts to remedy the effects of intentional segregation with its accompanying stigma. The benefits of neighborhood schooling are racially neutral. This manifestly is true in Los Angeles where over 75% of the public school body is composed of groups viewed as racial minorities. See notes 1 and 16, *supra*. Moreover, the Proposition simply removes one means of achieving the state created right to desegregated education. School districts retain the obligation to alleviate segregation regardless of cause. And the state courts still may order desegregation measures other than pupil school assignment or pupil transportation.[31]

Even if we could assume that Proposition I had a dispro-

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deference that one pays to the trial court's determination of the factual issue, and indeed, the extent to which one characterizes the intent issue as a question of fact or a question of law, will vary in different contexts.") (STEVENS, J., concurring).

[31] In *Brown* v. *Califano*, *supra*, the Court of Appeals found that a federal statute preventing the Department of Health, Education, and Welfare (HEW) from requiring busing "to a school other than the school which is nearest the student's home," 42 U. S. C. § 2000d (1976), was not unconstitutional. HEW retained authority to encourage school districts to desegregate through other means, and the enforcement powers of the Department of Justice were left untouched. The court therefore concluded that the limits on HEW's ability to order mandatory busing did not have a discriminatory effect. And, having done so, it refused to inquire into legislative motivation: "Absent discriminatory effect, judicial inquiry into legislative motivation is unnecessary, as well as undesirable." *Id.*, at 1234.

portionate adverse effect on racial minorities, we see no reason to challenge the Court of Appeal's conclusion that the voters of the State were not motivated by a discriminatory purpose. See 113 Cal. App. 3d, at 654–655. In this case the Proposition was approved by an overwhelming majority of the electorate.[32] It received support from members of all races.[33] The purposes of the Proposition are stated in its text and are legitimate, nondiscriminatory objectives. In these circumstances, we will not dispute the judgment of the Court of Appeal or impugn the motives of the State's electorate.

Accordingly the judgment of the California Court of Appeal is

Affirmed.

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[32] Cf. *Washington* v. *Davis*, 426 U. S. 229, 253 (1976) (STEVENS, J., concurring) ("It is unrealistic . . . to invalidate otherwise legitimate action simply because an improper motive affected the deliberation of a participant in the decisional process. A law conscripting clerics should not be invalidated because an atheist voted for it.").

[33] Proposition 1 received support from 73.9% of the voters in Los Angeles county which has a "minority" population—including persons of Spanish origin—of over 50%. California Secretary of State, Statement of the Vote, November 6, 1979 Election, 3. See note 16, *supra*. By contrast, the Proposition received its smallest percentage of the vote in Humboldt and Marin counties which are nearly all-white in composition.

1. [illegible]

[illegible]

[illegible]

[illegible]

SUPREME COURT OF THE UNITED STATES

No. 81-38

MARY ELLEN CRAWFORD, A MINOR, ETC., ET AL., PETITIONERS *v.* BOARD OF EDUCATION OF THE CITY OF LOS ANGELES, ET AL.

ON WRIT OF CERTIORARI TO THE COURT OF APPEAL OF CALIFORNIA, SECOND APPELLATE DISTRICT

[June 30, 1982]

JUSTICE BLACKMUN, with whom JUSTICE BRENNAN joins, concurring.

While I join the opinion of the Court, I write separately to address what I believe are the critical distinctions between this case and *Washington* v. *Seattle School District No. 1*, *ante*.

The Court always has recognized that distortions of the political process have special implications for attempts to achieve equal protection of the laws. Thus the Court has found particularly pernicious those classifications that threaten the ability of minorities to involve themselves in the process of self-government, for if laws are not drawn within a "just framework," *Hunter* v. *Erickson*, 393 U. S. 385, 393 (1969) (Harlan, J., concurring), it is unlikely that they will be drawn on just principles.

The Court's conclusion in *Seattle* followed inexorably from these considerations. In that case the statewide electorate reallocated decisionmaking authority to "'mak[e] it *more* difficult for certain racial and religious minorities [than for other members of the community] to achieve legislation that is in their interest.'" *Washington* v. *Seattle School District No. 1*, *ante*, at —— (emphasis in original), quoting *Hunter* v. *Erickson*, 393 U. S., at 395 (Harlan, J., concurring) (slip op.

12). The Court found such a political structure impermissible, recognizing that if a class cannot participate effectively in the process by which those rights and remedies that order society are created, that class necessarily will be "relegated, by state fiat, in a most basic way to second-class status." *Plyler* v. *Doe*, —— U. S. ——, —— (1982) (BLACKMUN, J., concurring) (slip op. 4).

In my view, something significantly different is involved in this case. State courts do not create the rights they enforce; those rights originate elsewhere—in the state legislature, in the State's political subdivisions, or in the state constitution itself. When one of those rights is repealed, and therefore is rendered unenforceable in the courts, that action hardly can be said to restructure the State's decisionmaking mechanism. While the California electorate may have made it more difficult to achieve desegregation when it enacted Proposition I, to my mind it did so not by working a structural change in the political *process* so much as by simply repealing the right to invoke a judicial busing remedy. Indeed, ruling for petitioners on a *Hunter* theory seemingly would mean that statutory affirmative action or antidiscrimination programs never could be repealed, for a repeal of the enactment would mean that enforcement authority previously lodged in the state courts was being removed by another political entity.

In short, the people of California—the same "entity" that put in place the state constitution, and created the enforceable obligation to desegregate—have made the desegregation obligation judicially unenforceable. The "political process or the decisionmaking mechanism used to *address* racially conscious legislation" has not been "singled out for peculiar and disadvantageous treatment," *Washington* v. *Seattle School District No. 1*, *ante*, at —— (emphasis in original) (slip op. 27), for those political mechanisms that create and repeal the rights ultimately enforced by the courts were left entirely unaffected by Proposition I. And I cannot conclude that the repeal of a state-created right—or, analogously, the removal of the judicary's ability to enforce that right—"curtail[s] the operation of those political processes ordinarily to be relied upon to protect minorities." *Ibid.*, quoting *United States* v. *Carolene Products Co.*, 304 U. S. 144, 152–153, n. 4.

Because I find *Seattle* distinguishable from this case, I join the opinion and judgment of the Court.

SUPREME COURT OF THE UNITED STATES

No. 81-38

MARY ELLEN CRAWFORD, A MINOR, ETC., ET AL., PETITIONERS *v.* BOARD OF EDUCATION OF THE CITY OF LOS ANGELES ET AL.

ON WRIT OF CERTIORARI TO THE COURT OF APPEAL OF CALIFORNIA, SECOND APPELLATE DISTRICT

[June 30, 1982]

JUSTICE MARSHALL, dissenting.

The Court today addresses two state constitutional amendments, each of which is admittedly designed to substantially curtail, if not eliminate, the use of mandatory student assignment or transportation as a remedy for *de facto* segregation. In *Washington* v. *Seattle School District No. 1, ante (Seattle),* the Court concludes that Washington's Initiative 350, which effectively prevents school boards from ordering mandatory school assignment in the absence of a finding of *de jure* segregation within the meaning of the Fourteenth Amendment, is unconstitutional because "it uses the racial nature of an issue to define the governmental decisionmaking structure, and thus imposes substantial and unique burdens on racial minorities." *Seattle, ante,* at ——. Inexplicably, the Court simultaneously concludes that Calfornia's Proposition I, which effectively prevents a state court from ordering the same mandatory remedies in the absence of a finding of *de jure* segregation, *is* constitutional because "having gone beyond the requirements of the Federal Constitution, the State was free to return in part to the standard prevailing generally throughout the United States." *Ante,* at ——. Because I fail to see how a fundamental redefinition of the governmental decisionmaking structure with respect to the same racial issue can be unconstitutional when the state seeks to remove the authority from local school boards, yet constitutional when the state attempts to achieve the same result by limiting the power of its courts, I must dissent from the Court's decision to uphold Proposition I.

I

In order to understand fully the implications of the Court's action today, it is necessary to place the facts concerning the adoption of Proposition I in their proper context. Nearly two decades ago, a unanimous California Supreme Court declared that "[t]he segregation of school children into separate schools because of their race, even though the physical facilities and the methods and quality of instruction in the several schools may be equal, deprives the children of the minority group of equal opportunities for education and denies them equal protection and due process of the law." *Jackson* v. *Pasadena City School District*, 59 Cal. 2d 876, 880, 382 P. 2d 878, 880–881 (1963). Recognizing that the "right to an equal opportunity for education and the harmful consequences of segregation" do not differ according to the *cause* of racial isolation, the California Supreme Court declined to adopt the distinction between *de facto* and *de jure* segregation engrafted by this Court on the Fourteenth Amendment. *Id.*, at 881, 382 P. 2d, at 881–882. Instead, the court clearly held that "school boards [must] take steps, insofar as reasonably feasible, to alleviate racial imbalance in schools regardlesss of its cause." *Id.*, at 882, 382 P. 2d, at 882.

As the California Supreme Court subsequently explained, the duty established in *Jackson* does not require that "each school in a district . . . reflect the racial composition of the district as a whole." *Crawford* v. *Board of Education*, 17 Cal. App. 3d 280, 302, 551 P. 2d 28, 42 (1976) (*Crawford I*). Rather, it is sufficient that school authorities "take reasonable and feasible steps to eliminate *segregated* schools, i. e., schools in which the minority student enrollment is so disproportionate as realistically to isolate minority students from other students and thus deprive minority students of an integrated educational experience." *Id.*, at 303, 551 P. 2d, at 43 (emphasis in original). Moreover, the California courts have made clear that the primary responsibility for implementing this state constitutional duty lies with local school boards. "[S]o long as a local school board initiates and implements reasonably feasible steps to alleviate school segregation in its district, and so long as such steps produce meaningful progress in the alleviation of such segregation, and its harmful consequences, . . . the judiciary should [not] intervene in the desegregation process." *Id.*, at 305–306, 551 P. 2d, at 45. If, however, a school board neglects or refuses to implement meaningful programs designed to bring about an end to racial isolation in the public schools, "the court is left with no alternative but to intervene to protect the constitutional rights of minority children." *Id.*, at 307, 551 P. 2d, at 45. When judicial intervention is necessary, the court "may exercise broad equitable powers in formulating and supervising a plan which the court finds will insure meaningful progress to alleviate the harmful consequences of school segregation in the district." *Ibid*, 551 P. 2d, at 46. Moreover, "once a school board defaults in its constitutional task, the court, in devising a remedial order, is not precluded from requiring the busing of children as part of a reasonably feasible desegregation plan." *Id.*, at 310, 551 P. 2d, at 48.

Like so many other decisions protecting the rights of minorities, California's decision to eradicate the evils of segregation regardless of cause has not been a popular one. In the nearly two decades since the state Supreme Court's decision in *Jackson*, there have been repeated attempts to restrain school boards and courts from enforcing this constitutional guarantee by means of mandatory student transfers or assignments. In 1970, shortly after the San Francisco Unified School District voluntarily adopted a desegregation plan involving mandatory student assignment, the California legislature enacted Education Code § 1009.5, Cal. Educ. Code Ann. § 1009.5, currently codified at Cal. Educ. Code Ann.

§ 35350 (West), which provides that "no governing board of a school district shall require any student or pupil to be transported for any purpose or for any reason without the written permission of the parent or guardian." In *San Francisco Unified School District* v. *Johnson*, 3 Cal. 3d 937, 479 P. 2d 669 (1971), the California Supreme Court interpreted this provision only to bar a school district from compelling students, without parental consent, to use means of transportation furnished by the district. Construing the statute to prohibit nonconsensual assignment of students for the purpose of eradicating *de jure* or *de facto* segregation, the court concluded, would clearly violate both the state and the federal constitution by "exorcising a method that in many circumstances is the sole and exclusive means of eliminating racial segregation in the schools." *Id.*, at 943, 479 P. 2d, at 671.

The very next year, opponents of mandatory student assignment for the purpose of achieving racial balance again attempted to eviscerate the state constitutional guarantee recognized in *Jackson*. Proposition 21, which was enacted by referendum in November 1972, stated that "no public school student shall, because of his race, creed, or color, be assigned to or be required to attend a particular school." Predictably, the California Supreme Court struck down Proposition 21 "for the same reasons set forth by us in *Johnson*." *Santa Barbara School District* v. *Superior Court*, 13 Cal. 3d 315, 324, 530 P. 2d 605, 613 (1975).

Finally, in 1979, the people of California enacted Proposition I. That Proposition, like all of the previous initiatives, effectively deprived California courts of the ability to enforce the state constitutional guarantee that minority children will not attend racially isolated schools by use of what may be "the sole and exclusive means of eliminating racial segregation from the schools," *San Francisco Unified School District* v. *Johnson*, 3 Cal. 3d, at 943, 479 P. 2d, at 671, mandatory student assignment and transfer. Unlike the earlier attempts to accomplish this objective, however, Proposition I does not purport to prevent mandatory assignments and transfers when such measures are predicated on a violation of the Federal constitution. Therefore, the only question presented by this case is whether the fact that mandatory transfers may still be made to vindicate federal constitutional rights saves this initiative from the constitutional infirmity presented in the previous attempts to accomplish this same objective. In my view, the recitation of the obvious—that a state constitutional amendment does not override federal constitutional guarantees—cannot work to deprive minority children in California of their federally protected right to the equal protection of the laws.

II

A

In *Seattle*, the Court exhaustively set out the relevant principles that control the present inquiry. We there found that a series of precedents, exemplified by *Hunter* v. *Erickson*, 393 U. S. 385 (1969) and *Lee* v. *Nyquist*, 318 F. Supp. 710 (WDNY 1970) (three-judge court), summarily aff'd, 402 U. S. 935 (1971), establish that the fourteenth amendment prohibits a State from allocating "governmental power nonneutrally, by explicitly using the *racial* nature of a decision to determine the decisionmaking process." *Seattle, ante*, at —— (emphasis in original). We concluded that "State action of this kind . . . 'places *special* burdens on racial minorities within the governmental process' . . . thereby 'making it *more* difficult for certain racial and religious minorities [than for other members of the community] to achieve legislation that is in their interest.'" *Ibid.* (emphasis in original), quoting *Hunter* v. *Erickson*, 393 U. S., at 391, 395 (Harlan, J., concurring). *Seattle, ante*, at ——.

It is therefore necessary to determine whether Proposition I works a "non-neutral" reallocation of governmental power on the basis of the racial nature of the decision. This determination is also informed by our decision in *Seattle*. In that case we were presented with a state-wide initiative which effectively precluded local school boards from ordering mandatory student assignment or transfer except where required to remedy a constitutional violation. We concluded that the initiative violated the Fourteenth Amendment because it reallocated decisionmaking authority over racial issues from the local school board to a "new and remote level of government." *Seattle, ante*, at ——. In reaching this conclusion, we specifically affirmed three principles that are particularly relevant to the present inquiry.

First, we rejected the State's argument that a state-wide initiative prohibiting mandatory student assignment has no "racial overtones" simply because it does not mention the words "race" or "integration." *Seattle, ante*, at ——. We noted that "[n]either the initiative's sponsors, nor the District Court, nor the Court of Appeals had any difficulty perceiving the racial nature of the issue settled by Initiative 350." *Ibid.* In light of its language and the history surrounding its adoption, we found it "beyond reasonable dispute . . . that the initiative was enacted '"because of," not merely "in spite of," its adverse effects upon' busing for integration." *Seattle, ante*, at ——, quoting *Personnel Administrator of Massachusetts* v. *Feeney*, 442 U. S. 256, 279 (1979). Moreover, we rejected the Solicitor General's remarkable contention, a contention also pressed here, that "busing for integration . . . is not a peculiarly 'racial' issue at all." *Seattle, ante*, at ——. While not discounting the value of an integrated education to non-minority students, we concluded that *Lee* v. *Nyquist, supra*, definitively established that "desegregation of the public schools . . . at bottom inures primarily to the benefit of the minority, and is designed for that purpose," thereby bringing it within the *Hunter* doctrine. *Seattle, ante*, at ——.

Second, the *Seattle* Court determined that Initiative 350 unconstitutionally reallocated power from local school boards to the state legislature or the state-wide electorate. After the enactment of Initiative 350, local school boards continued to exercise considerable discretion over virtually all educational matters, including student assignment. Those seeking to eradicate *de facto* segregation, however, were forced to "surmount a considerably higher hurdle than persons seeking comparable legislative action," *Seattle, ante,* at ——, for instead of seeking relief from the local school board, those pursuing this racial issue were forced to appeal to a different and more remote level of government. Just as in *Hunter* v. *Erickson, supra,* where those interested in enacting fair housing ordinances were compelled to gain the support of a majority of the electorate, we held that this reallocation of governmental power along racial lines offends the Equal Protection Clause. Our holding was not altered by the fact that those seeking to combat *de facto* segregation could still pursue their cause by petitioning local boards to enact voluntary measures or by seeking action from the state legislature. Nor were we persuaded by the argument that no transfer of power had occurred because the State was ultimately responsible for the educational policy of local school boards. We found it sufficient that Initiative 350 had deprived those seeking to redress a racial harm of the right to seek a particularly effective form of redress from the level of government ordinarily empowered to grant the remedy.

Finally, the Court's decision in *Seattle* implicitly rejected the argument that state action that reallocates governmental power along racial lines can be immunized by the fact that it specifically leaves intact rights guaranteed by the Fourteenth Amendment. The fact that mandatory pupil reassignment was still available as a remedy for *de jure* segregation did not alter the conclusion that an unconstitutional reallocation of power had occurred with respect to those seeking to combat *de facto* racial isolation in the public schools.

B

In my view, these principles inexorably lead to the conclusion that California's Proposition I works an unconstitutional reallocation of state power by depriving California courts of the ability to grant meaningful relief to those seeking to vindicate the state's guarantee against *de facto* segregation in the public schools. Despite Proposition I's apparent neutrality, it is "beyond reasonable dispute," *Seattle, ante,* at ——, and the majority today concedes, that "court ordered busing in *excess* of that required by the Fourteenth Amendment . . . prompted the initiation and probably the adoption of Proposition I." *Ante,* at 10, n. 18 (emphasis in original).[1] Because "minorities may consider busing for integration to be 'legislation that is in their interest,'" *Seattle, ante,* at ——, quoting *Hunter* v. *Erickson,* 393 U. S., at 395 (Harlan, J., concurring), Proposition I is sufficiently "racial" to invoke the *Hunter* doctrine.[2]

Nor can there be any doubt that Proposition I works a substantial reallocation of state power. Prior to the enactment of Proposition I, those seeking to vindicate the rights enumerated by the California Supreme Court in *Jackson* v. *Pas-*

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[1] Just as in *Seattle,* the fact that other types of student transfers conceivably might be prohibited does not alter this conclusion: "Neither the intiative's sponsors, nor the District Court, nor the Court of Appeals had any difficulty perceiving the racial nature of the issue settled by" Proposition I. *Seattle, ante,* at ——. Indeed in their response to the petition for certiorari, respondents characterized Proposition I as addressing but "one narrow area: the power of a state court to order mandatory student assignment or transportation as desegregation remedy." Brief in Opposition to Pet. for Cert. 9.

[2] It is therefore irrelevant whether the "benefits of neighborhood schooling are racially neutral," as the majority asserts. *Ante,* at 16; see *id.,* at 9. In *Washington* v. *Seattle School District No. 1, ante,* at —— (*Seattle*), we specifically rejected the argument that because some minorities as well as whites supported the initiative, it could not be considered a racial classification.

adena City School District, supra, just as those interested in attaining any other educational objective, followed a two-stage procedure. First, California's minority community could attempt to convince the local school board voluntarily to comply with its constitutional obligation to take reasonably feasible steps to eliminate racial isolation in the public schools. If the board was either unwilling or unable to carry out its constitutional duty, those seeking redress could petition the California state courts to require school officials to live up to their obligations. Busing could be required as part of a judicial remedial order. *Crawford I*, 17 Cal. 3d, at 310, 551 P. 2d, at ——.

Whereas Initiative 350 attempted to deny minority children the first step of this procedure, Proposition I eliminates by fiat the second stage: the ability of California courts to order meaningful compliance with the requirements of the state constitution. After the adoption of Proposition I, the only method of enforcing against a recalcitrant school board the state constitutional duty to eliminate racial isolation is to petition either the state legislature or the electorate as a whole. Clearly, the rules of the game have been significantly changed for those attempting to vindicate this state constitutional right.[3]

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[3] There can be no question that the practical effect of Proposition I will be to deprive state courts of "the sole and exclusive means of eliminating racial segregation from the schools." *San Francisco Unified School District* v. *Johnson*, 3 Cal. 3d 937, 943, 479 P. 2d 669, 671 (1971). As we have often noted "bus transportation has long been an integral part of all public educational systems, and it is unlikely that a truly effective remedy could be devised without continued reliance upon it." *North Carolina Board of Ed.* v. *Swann*, 402 U. S. 43, 46 (1971). Moreover, Proposition I prevents a state court from ordering school officials to take any action respecting *pupil school assignment*, as well as pupil transportation. Presumably, state courts could not design a remedy involving the "pairing" or "clustering" of schools, even if such a remedy did not involve *any* "busing." In the present case, the state trial court found that the voluntary programs proposed by the Los Angeles school board were "constitutionally suspect" be-

The majority seeks to conceal the unmistakable effects of Proposition I by calling it a "mere repeal" of the State's earlier commitment to do "'more' than the Fourteenth Amendment requires." *Ante*, at 7. Although it is true that we have never held that the "mere repeal of an existing [anti-discrimination] ordinance violates the Fourteenth Amendment," *Hunter* v. *Erickson*, 393 U. S., at 390, n. 5, it is equally clear that the reallocation of governmental power created by Proposition I is not a "mere repeal" within the meaning of any of our prior decisions.

In *Dayton Bd. of Education* v. *Brinkman*, 433 U. S. 406 (1977) the new members of the Dayton Board of Education repudiated a resolution drafted by their predecessors admitting the Board's role in the establishment of a segregated school system and calling for various remedial actions. In concluding that the Board was constitutionally permitted to withdraw its own prior *mea culpa*, this Court was careful to note that *"[t]he Board had not acted to undo operative regulations affecting the assignment of pupils or other aspects of the management of school affairs."* *Id.*, at 413 (emphasis added). Therefore, the only time that this Court has squarely held that a "mere repeal" did not violate the Fourteenth Amendment, it was presented with a situation where a governmental entity rescinded *its own* prior statement of policy without affecting any existing educational policy. It is no surprise that such conduct passed constitutional muster.

By contrast, in *Seattle*, *Hunter*, and *Reitman* v. *Mulkey*, 387 U. S. 369 (1967),[4] the three times that this Court has ex-

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cause they "place[d] the burden of relieving the racial isolation of the minority student upon the minority student." App. 160. Consequently, since "a voluntary program would not serve to integrate the community's schools," *Seattle*, *ante*, at ——. Proposition I, like the measures at issue in *Lee* v. *Nyquist*, 318 F. Supp. 710 (WDNY 1970) (three-judge court), summarily aff'd, 402 U. S. 935 (1971), and *Seattle*, precludes the effective enjoyment by California's minority children of their right to eliminate racially isolated schools.

[4] In *Reitman* v. *Mulkey*, 387 U. S. 369 (1967), this Court struck down

plicitly rejected the argument that a proposed change constituted a "mere repeal" of an existing policy, the alleged rescission was accomplished by a governmental entity other than the entity that had taken the initial action, and resulted in a drastic alteration of the substantive effect of existing policy. This case falls squarely within this latter category. To be sure, the *right* to be free from racial isolation in the public schools remains unaffected by Proposition I. See *ante*, at 7–8; see, *McKinny* v. *Oxnard Union High School District Board of Trustees*, —— Cal. 3d ——, —— P. 2d —— (1982) (slip op. at 13–14). But Proposition I does repeal the power of the state court to *enforce* this existing constitutional guarantee through the use of mandatory pupil assignment and transfer.

The majority asserts that the Fourteenth Amendment does not "require the people of a state to adhere to a judicial construction of their state constitution when that constitution itself vests final authority in the people." *Ante*, at 12. A state court's authority to order appropriate remedies for state constitutional violations, however, is no more based on the "final authority" of the people than the power of the local Seattle school board to make decisions regarding pupil assignment is premised on the State's ultimate control of the educational process. Rather, the authority of California courts to order mandatory student assignments in this context springs from the same source as the authority underlying other remedial measures adopted by state and federal courts in the absence of statutory authorization: the "courts power to provide equitable relief" to remedy a constitutional violation. *Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U. S. 1, 30 (1970); *Crawford I*, 17 Cal. 3d, at 307,

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another California ballot measure, granting every resident the absolute constitutional right to sell or rent his property to whoever he or she chooses. We held that the provision amounted to an unconstitutional authorization of private discrimination.

551 P. 2d, at 46 ("a trial court may exercise broad equitable powers in formulating and supervising a plan which the court finds will insure meaningful progress to alleviate . . . school segregation"). Even assuming that the source of a court's power to remedy a constitutional violation can be traced back to "the people," the majority's conclusion that "the people" can therefore confer that remedial power on a discriminatory basis is plainly inconsistent with our prior decisions. In *Hunter* v. *Erickson*, 393 U. S., at 392, we struck down the referendum at issue even though the people of Akron, Ohio undoubtedly retained "final authority" for all legislation. Similarly, in *Seattle* we concluded that the reallocation of power away from local school boards offended the Equal Protection clause even though the State of Washington "is ultimately responsible for providing education within its borders." *Ante*, at ——. The fact that this change was enacted through popular referendum, therefore, cannot immunize it from constitutional review. See *Lucas* v. *Colorado General Assembly*, 377 U. S. 713, 736–737 (1964).

As in *Seattle*, *Hunter*, and *Reitman*, Proposition I's repeal of the state court's enforcement powers was the work of an independent governmental entity, and not of the state courts themselves. That this repeal drastically alters the substantive rights granted by existing policy is patently obvious from the facts of this litigation.[5] By prohibiting California courts from ordering mandatory student assignment when necessary to eliminate racially isolated schools, Proposition I has placed an enormous barrier between minority children and the effective enjoyment of their constitutional rights, a barrier that is not placed in the path of those who seek to vindicate other rights granted by state law. This Court's precedents demonstrate that, absent a compelling state interest, which respondents have hardly demonstrated, such a discriminatory barrier cannot stand.[6]

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[5] Indeed Proposition I by its express terms allows for the modification of existing plans upon the application of any interested person. Art. 1, § 7(a).

The fact that California attempts to cloak its discrimination in the mantle of the Fourteenth Amendment does not alter this result. Although it might seem "paradoxical" to some members of this Court that a referendum that adopts the wording of the Fourteenth Amendment might violate it, the paradox is specious. Because of the Supremacy Clause, Proposition I would have precisely the same legal effect if it contained no reference to the Fourteenth Amendment. The lesson of *Seattle* is that a state, in prohibiting conduct that is not required by the Fourteenth Amendment, may nonetheless create a discriminatory reallocation of governmental power that does violate equal protection. The fact that some less effective avenues remain open to those interested in mandatory student assignment to eliminate racial isolation, like the fact that the voters in *Hunter* conceivably might have enacted fair housing legislation, or that those interested in busing to eliminate racial isolation in *Seattle* conceivably might use the state's referendum process, does not justify the discriminatory reallocation of governmental decision-making.

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[6] As the majority notes, Proposition I states that "the people of California find and declare that this amendment is necessary to serve compelling public interests," including, *inter alia*, "making the most efficient use of . . . limited financial resources," protecting the "health and safety" of all students, preserving "harmony and tranquility," and "protecting the environment." *Ante*, at 4, n. 6. These purported justifications, while undoubtedly meritorious, are clearly insufficient to sustain the racial classification established by Proposition I. As we have often noted, racial classifications may only be upheld where "necessary, and not merely rationally related, to the accomplishment of a permissible state policy." *McLaughlin* v. *Florida*, 379 U. S. 184, 196 (1964). It goes without saying that a self-serving conclusory statement of necessity will not suffice to fulfill this burden. See *Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U. S. 1, 28, 29–31 (1971) (rejecting a similar list of justifications for establishing a racial classification). "In any event, [respondents] have failed to show that the purpose[s] they impute to the [Proposition] could not be accomplished by alternative methods, not involving racial distinctions." *Lee* v. *Nyquist*, 318 F. Supp., at 720.

Parenthetically, it is interesting to note that the allegedly compelling interest in establishing "neighborhood schools" so often referred to by the majority appears nowhere in the official list of justifications. The absence of any mention of this supposed justification is not surprising in light of the fact that the Proposition's ban on student "assignment" effectively prevents desegregation remedies that would not require a student to leave his "neighborhood." See n. 3, *infra*.

In this case, the reallocation of power occurs in the judicial process—the major arena minorities have used to ensure the protection of rights "in their interest." *Hunter* v. *Erickson*, 383 U. S., at 395 (Harlan, J., concurring). Certainly, *Hunter* and *Seattle* cannot be distinguished on the ground that they concerned the reallocation of legislative power, whereas Proposition I redistributes the inherent power of a court to tailor the remedy to the violation. As we have long recognized, courts too often have been "the sole practicable avenue open to a minority to petition for redress of grievances." *NAACP* v. *Button*, 371 U. S. 415, 430 (1963). See *Reitman* v. *Mulkey*, 387 U. S., at 377 (invalidating state constitutional amendment because "[t]he right to discriminate, including the right to discriminate on racial grounds, was now embodied in the State's basic charter, immune from legislative, executive, *or judicial* regulation at any level of the State government") (emphasis added). It is no wonder, as the present case amply illustrates, that whatever progress that has been made towards the elimination of *de facto* segregation has come from the California courts. Indeed, Proposition I, by denying full access to the only branch of government that has been willing to address this issue meaningfully, is far worse for those seeking to vindicate the plainly unpopular cause of racial integration in the public schools than a simple reallocation of an often unavailable and unresponsive legislative process. To paraphrase, "[i]t surely is an excessively formal excercise . . . to argue that the procedural revisions at issue in Hunter [and *Seattle*] imposed special burdens on minorities, but that the selective allocation of decisionmaking authority worked by [Proposition I] does not erect comparable political obstacles." *Seattle, ante,* at ——.

III

Even if the effects of Proposition I somehow can be distinguished from the enactments at issue in *Hunter* and *Seattle*, the result reached by the majority today is still plainly inconsistent with our precedents. Because it found that the segregation of the California public schools violated the Fourteenth Amendment, the state trial court never considered whether Proposition I was itself unconstitutional because it was the product of discriminatory intent. Despite the absence of *any* factual record on this issue, the Court of Appeals rejected petitioner's argument that the law was motivated by a discriminatory intent on the ground that the recitation of several potentially legitimate purposes in the legislation's preamble rendered any claim that it had been enacted for an invidious purpose "pure speculation." *Crawford* v. *Board of Education*, 113 Cal. App. 3d 633, 654 (1980) (*Crawford II*).

In *Arlington Heights* v. *Metropolitan Housing Development Corporation*, 429 U. S. 252, 266 (1977), we declared that "[d]etermining whether invidious discriminatory purpose was a motivating factor demands a sensitive inquiry into such circumstantial and direct evidence of intent as may be available." Petitioners assert that the disproportionate impact of Proposition I, combined with the circumstances surrounding its adoption and the history of opposition to integration cited above, *supra*, at ——, clearly indicate the presence of discriminatory intent. See Brief for Petitioners 64–96. Yet despite the fact that *no inquiry* has been conducted into these allegations by either the trial or the appellate court, this Court, in its haste to uphold the banner of "neighborhood schools," affirms a factual determination that was never made. Such blind allegiance to the conclusory statements of a lower court is plainly forbidden by our prior decisions.[7]

IV

Proposition I is in some sense "better" than the Washington initiative struck down in *Seattle*.[8] In their generosity, California voters have allowed those seeking racial balance to petition the very school officials who have steadfastly maintained the color line at the school house door to comply voluntary with their continuing state constitutional duty to desegregate. At the same time, the voters have deprived minorities of the only method of redress that has proven effective—the full remedial powers of the state judiciary. In the name of the State's "ability to experiment," *ante*, at 7, the Court today allows this placement of yet another burden in the path of those seeking to counter the effects of nearly three centuries of racial prejudice. Because this decision is neither justified by our prior decisions nor consistent with our duty to guarantee all citizens the equal protection of the laws, I must dissent.

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[7] The majority's reliance on *Reitman* v. *Mulkey*, 387 U. S. 369 (1967) is therefore misplaced. How can any deference be given to the State court's "knowledge of the facts and circumstances concerning the passage and potential passage" of Proposition I, *id.*, at 378, when no such findings were ever made.

[8] Inititive 350, however, at least did "not hinder [the] State from enforcing the State Constitution." *Seattle*, *ante*, at —— (POWELL, J., dissenting).

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All issues available have been filmed.
Unfortunately, any scattered missing issues are no longer available.

READEX
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81/81-55

(Slip Opinion)

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Lumber Co.*, 200 U. S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

NEW YORK *v.* FERBER

CERTIORARI TO THE COURT OF APPEALS OF NEW YORK

No. 81–55. Argued April 27, 1982—Decided July 2, 1982

A New York statute prohibits persons from knowingly promoting a sexual performance by a child under the age of 16 by distributing material which depicts such a performance. The statute defines "sexual performance" as any performance that includes sexual conduct by such a child, and "sexual conduct" is in turn defined as actual or simulated sexual intercourse, deviate sexual intercourse, sexual bestiality, masturbation, sado-masochistic abuse, or lewd exhibition of the genitals. Respondent bookstore proprietor was convicted under the statute for selling films depicting young boys masturbating, and the Appellate Division of the New York Supreme Court affirmed. The New York Court of Appeals reversed, holding that the statute violated the First Amendment as being both underinclusive and overbroad. The court reasoned that in light of the explicit inclusion of an obscenity standard in a companion statute banning the knowing dissemination of similarly defined material, the statute in question could not be construed to include an obscenity standard, and therefore would prohibit the promotion of materials traditionally entitled to protection under the First Amendment.

Held: As applied to respondent and others who distribute similar material, the statute in question does not violate the First Amendment as applied to the States through the Fourteenth Amendment. Pp. 5–26.

(a) The States are entitled to greater leeway in the regulation of pornographic depictions of children for the following reasons: (1) the legislative judgment that the use of children as subjects of pornographic materials is harmful to to physiological, emotional, and mental health of the child, easily passes muster under the First Amendment; (2) the standard of *Miller v. California*, 413 U. S. 15, for determining what is legally obscene is not a satisfactory solution to the child pornography problem; (3) the advertising and selling of child pornography provides an economic motive for and is thus an integral part of the production of such materi-

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als, an activity illegal throughout the Nation; (4) the value of permitting live performances and photographic reproductions of children engaged in lewd exhibitions is exceedingly modest, if not *de minimis*; and (5) recognizing and classifying child pornography as a catagory of material outside the First Amendment's protection is not incompatible with this Court's decisions dealing with what speech is unprotected. When a definable class of material, such as that covered by the New York statute, bears so heavily and pervasively on the welfare of children engaged in its production, the balance of competing interests is clearly struck, and it is permissible to consider these materials as without the First Amendment's protection. Pp. 8–15.

(b) The New York statute describes a category of material the production and distribution of which is not entitled to First Amendment protection. Accordingly, there is nothing unconstitutionally "underinclusive" about the statute, and the State is not barred by the First Amendment from prohibiting the distribution of such unprotected materials produced outside the State. Pp. 15–17.

(c) Nor is the New York statute unconstitutionally overbroad as forbidding the distribution of material with serious literary, scientific, or educational value. The substantial overbreath rule of *Broadrick* v. *Oklahoma*, 413 U. S. 601, applies. This is the paradigmatic case of a state statute whose legitimate reach dwarfs its arguably impermissible applications. "[W]hatever overbreadth exists should be cured through case-by-case analysis of the fact situations to which [the statute's] sanctions, assertedly, may be applied." *Broadrick* v. *Oklahoma*, *supra*, at 615–616. Pp. 18–25.

52 N.Y. 2d 674, 422 N.E. 2d 523, reversed and remanded.

WHITE, J., delivered the opinion of the Court, in which BURGER, C. J., and POWELL, REHNQUIST, and O'CONNOR, JJ., joined. O'CONNOR, J., filed a concurring opinion. BRENNAN, J., filed an opinion concurring in the judgment, in which MARSHALL, J., joined. BLACKMUN, J., concurred in the result. STEVENS, J., filed an opinion concurring in the judgment.

NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D.C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

SUPREME COURT OF THE UNITED STATES

No. 81-55

NEW YORK, PETITIONER *v.* PAUL IRA FERBER

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS
OF NEW YORK

[July 2, 1982]

JUSTICE WHITE delivered the opinion of the Court.

At issue in this case is the constitutionality of a New York criminal statute which prohibits persons from knowingly promoting sexual performances by children under the age of 16 by distributing material which depicts such performances.

I

In recent years, the exploitive use of children in the production of pornography has become a serious national problem.[1] The federal government and forty-seven States have sought to combat the problem with statutes specifically directed at the production of child pornography. At least half of such statutes do not require that the materials produced be legally obscene. Thirty-five States and the United States

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[1] "Child pornography and child prostitution have become highly organized, multimillion dollar industries that operate on a nationwide scale." S. Rep. No. 95-438, p. 5 (1978). One researcher has documented the existence of over 260 different magazines which depict children engaging in sexually explicit conduct. *Ibid.* "Such magazines depict children, some as young as three to five years of age . . . The activities featured range from lewd poses to intercourse, fellatio, cunnilingus, masturbation, rape, incest and sado-masochism." *Id.*, at 6. In Los Angeles alone, police reported that 30,000 children have been sexually exploited. Sexual Exploitation of Children, Hearings before the Subcommittee on Select Education of the House Comm. on Ed. and Labor, 95th Cong., 1st Sess., 41-42 (1977).

Congress have also passed legislation prohibiting the distribution of such materials; twenty States prohibit the distribution of material depicting children engaged in sexual conduct without requiring that the material be legally obscene.[2]

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[2] In addition to New York, nineteen States have prohibited the dissemination of material depicting children engaged in sexual conduct regardless of whether the material is obscene. Ariz. Rev. Stat. Ann. § 13–3553 (Supp. 1981); Colo. Rev. Stat. § 18–6–403 (Supp. 1981); Del. Code Ann., Tit. 11, §§ 1108, 1109 (1979); Fla. Stat. § 847.014 (1976); Haw. Rev. Stat. § 707–751 (Supp. 1981); Ky. Rev. Stat. §§ 531.320, 531.340–531.360 (1980); La. Rev. Stat. § 14:81.1(A)(3) (West Supp. 1982); Mass. Gen. Laws Ann., ch. 272, § 29A (West Supp. 1982); Mich. Comp. Laws § 750.145c(3) (1982); Miss. Code Ann. § 97–5–33(4) (Supp. 1981); Mont. Code Ann. § 45–5–625 (1981); N. J. Stat. Ann. § 2C:24–4(b)(5) (West 1981); Okla. Stat., Tit. 21, § 1021.2 (Supp. 1981–1982); Pa. Cons. Stat. § 6312(c) (1982); R. I. Gen. Laws § 11–9–1.1 (1981); Tex. Penal Code Ann. Tit. 9, § 43.25 (1982); Utah Code Ann. § 76–10–1206.5(3) (Supp. 1981); W. Va. Code § 61–8C–3 (Supp. 1981); Wis. Stat. § 940.203(4) (West) (Supp. 1981–1982).

Fifteen States prohibit the dissemination of such material only if it is obscene. Ala. Code § 13–7–231, 13–7–232 (Supp. 1981); Ark. Stat. Ann. § 41–4201 (Supp. 1981); Cal. Penal Code Ann. § 311.2(b) (1970) (general obscenity statute); Ill. Stat. ch. 38, § 11–20a(b)(1) (1979); Ind. Code § 35–30–10.1–2 (1979); Me. Rev. Stat. Ann., Tit. 17, § 2923(1) (Supp. 1981–1982); Minn. Stat. § 617.246(3) and (4) (Supp. 1982); Neb. Rev. Stat. § 28–1463(2) (1979); N. H. Rev. Stat. Ann. § 650:2(II) (Supp. 1981); N. D. Cent. Code § 12.1–27.1–01 (1976) (general obscenity statute); Ohio Rev. Code Ann. § 2907.321(A) (1982); Ore. Rev. Stat. § 163.485 (1981); S. D. Comp. Laws Ann. §§ 22–22–24, 22–22–25 (1979); Tenn. Code Ann. § 39–1020 (1981); Wash. Rev. Code § 9.68A.030 (1981). The federal statute also prohibits dissemination only if the material is obscene. 18 U. S. C. § 2252(a) (1976 Supp. IV). Two States prohibit dissemination only if the material is obscene as to minors. Conn. Gen. Stat. Ann. § 53a–196b (Supp. 1982); Va. Code § 18.2–374.1 (1982).

Twelve States prohibit only the use of minors in the production of the material. Alaska Stat. Ann. § 11.41.455 (1981); Ga. Code § 26–9943(a) (Supp. 1981); Idaho Code § 44–1306 (1979); Iowa Code § 728.12 (1979); Kan. Stat. Ann. § 21–3516 (1981); Md. Crim. Law Code Ann. § 419A (Supp. 1981); Mo. Rev. Stat. § 568.060(1)(b) (1979); Nev. Rev. Stat. § 200.509 (1981); N. M. Stat. Ann. § 30–6–1 (1980); N. C. Gen. Stat. § 14–190.6 (1981); S. C. Code § 16–15–380 (1981); Wyo. Stat. Ann. § 14–3–102(a)(v)(E) (1977).

New York is one of the twenty. In 1977, the New York legislature enacted Article 263 of its Penal Law. Section 263.05 criminalizes as a class C felony the use of a child in a sexual performance:

> "A person is guilty of the use of a child in a sexual performance if knowing the character and content thereof he employs, authorizes or induces a child less than sixteen years of age to engage in a sexual performance or being a parent, legal guardian or custodian of such child, he consents to the participation by such child in a sexual performance."

A "sexual performance is defined as 'any performance or part thereof which includes sexual conduct by a child less than sixteen years of age,'" § 263.1. "Sexual conduct" is in turn defined in § 263.3:

> "'Sexual conduct' means actual or simulated sexual intercourse, deviate sexual intercourse, sexual bestiality, masturbation, sado-masochistic abuse, or lewd exhibition of the genitals."

A performance is defined as "any play, motion picture, photograph or dance" or "any other visual presentation exhibited before an audience." § 263.4

At issue in this case is § 263.15, defining a class D felony:[3]

> "A person is guilty of promoting a sexual performance by a child when, knowing the character and content thereof, he produces, directs or promotes any performance which includes sexual conduct by a child less than sixteen years of age."

To "promote" is also defined:

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[3] Class D felonies carry a maximum punishment for up to seven years as to individuals, and as to corporations a fine of up to $10,000. N.Y. Penal Law §§ 70.00, 80.10. Respondent Ferber was sentenced to 45 days in prison.

> "'Promote' means to procure, manufacture, issue, sell, give, provide, lend, mail, deliver, transfer, transmute, publish, distribute, circulate, disseminate, present, exhibit or advertise, or to offer or agree to do the same."

A companion provision bans only the knowing dissemination of obscene material. § 263.10.

This case arose when Paul Ferber, the proprietor of a Manhattan bookstore specializing in sexually oriented products, sold two films to an undercover police officer. The films are devoted almost exclusively to depicting young boys masturbating. Ferber was indicted on two counts of § 263.10 and two counts of § 263.15, the two New York laws controlling dissemination of child pornography.[4] After a jury trial, Ferber was acquitted of the two counts of promoting an obscene sexual performance, but found guilty of the two counts under § 263.15, which did not require proof that the films were obscene. Ferber's convictions were affirmed without opinion by the Appellate Division of the New York State Supreme Court. 72 A.D. 2d, 558, 424 N.Y.S. 2d, 967.

The New York Court of Appeals reversed, holding that § 263.15 violated the First Amendment. 52 N.Y. 2d, 674, 422 N.E. 2d, 523 (1981). The court began by noting that in light of § 263.10's explicit inclusion of an obscenity standard, § 263.15 could not be construed to include such a standard. Therefore, "the statute would . . . prohibit the promotion of materials which are traditionally entitled to constitutional protection from government interference under the First Amendment." 52 N.Y. 2d at 678, 422 N.E. 2d at 525. Although the court recognized the State's "legitimate interest in protecting the welfare of minors" and noted that this "interest may transcend First Amendment concerns," 52 N.Y. 2d at 679, 422 N.E. 2d at 526, it nevertheless found two fatal defects in the New York statute. Section 263.15 was underinclusive because it discriminated against visual portrayals of children engaged in sexual activity by not also prohibiting the distribution of films of other dangerous activity. It was also overbroad because it prohibited the distribution of materials produced outside the State, as well as materials, such as medical books and educational sources, which "deal with adolescent sex in a realistic but nonobscene manner." 52 N.Y. 2d at 681, 422 N.E. 2d at 526. Two judges dissented. We granted the State's petition for certiorari, —— U. S. —— (1981), presenting the single question:

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[4] The trial judge rejected Ferber's First Amendment attack on the two sections in denying a motion to dismiss the indictment. 96 Misc. 2d 669, 409 N.Y.S. 2d 632 (1978).

> "To prevent the abuse of children who are made to engage in sexual conduct for commercial purposes, could the New York State Legislature, consistent with the First Amendment, prohibit the dissemination of material which shows children engaged in sexual conduct, regardless of whether such material is obscene?"

II

The Court of Appeals proceeded on the assumption that the standard of obscenity incorporated in § 263.10, which follows the guidelines enunciated in *Miller* v. *California*, 413 U. S. 15 (1973),[5] constitutes the appropriate line dividing protected from unprotected expression by which to measure a regulation directed at child pornography. It was on the premise that "nonobscene adolescent sex" could not be singled out for special treatment that the court found § 263.15 "strikingly underinclusive." Moreover, the assumption that the constitutionally permissible regulation of pornography could not be more extensive with respect to the distribution of material depicting children may also have led the court to conclude that a narrowing construction of § 263.15 was unavailable.

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[5] New York Penal Law § 235.00 (1) (1980); *People* v. *Illardo*, 48 N.Y. 2d 408, 415 and n. 3; 399 N.E. 2d 59, 62–63 and n. 3 (1979).

The Court of Appeals' assumption was not unreasonable in light of our decisions. This case, however, constitutes our first examination of a statute directed at and limited to depictions of sexual activity involving children. We believe our inquiry should begin with the question of whether a State has somewhat more freedom in proscribing works which portray sexual acts or lewd exhibitions of genitalia by children.

A

In *Chaplinsky* v. *New Hampshire*, 315 U. S. 568 (1942), the Court laid the foundation for the excision of obscenity from the realm of constitutionally protected expression:

> "There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. These include the lewd and obscene . . . It has been well observed that such utterances are no essential part of any exposition of ideas and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest and morality. . . ." *Id.*, at 571–572.

Embracing this judgment, the Court squarely held in *Roth* v. *United States*, 354 U. S. 476 (1957), that "obscenity is not within the area of constitutionally protected speech or press." *Id.*, at 485. The Court recognized that "rejection of obscenity as utterly without redeeming social importance" was implicit in the history of the First Amendment: The original states provided for the prosecution of libel, blasphemy and profanity and the "universal judgment that obscenity should be restrained [is] reflected in the international agreement of over 50 nations, in the obscenity laws of all of the 48 states, and in the 20 obscenity laws enacted by Congress from 1842 to 1956." *Ibid.*

Roth was followed by fifteen years during which this Court struggled with "the intractable obscenity problem." *Interstate Circuit, Inc.* v. *Dallas*, 390 U. S. 676, 704 (1968) (Harlan, J.). See, *e. g.*, *Redrup* v. *New York*, 386 U. S. 767 (1967). Despite considerable vacillation over the proper definition of obscenity, a majority of the members of the Court remained firm in the position that "the States have a legitimate interest in prohibiting dissemination or exhibition of obscene material when the mode of dissemination carries with it a significant danger of offending the sensibilities of unwilling recipients or of exposure to juveniles." *Miller* v. *California*, 413 U. S., at 19; *Stanley* v. *Georgia*, 394 U. S. 557, 567 (1969); *Ginsberg* v. *New York*, 390 U. S. 629, 637–643 (1968); *Interstate Circuit, Inc.* v. *Dallas*, *supra*, at 690; *Redrup* v. *New York*, *supra*, at 769; *Jacobellis* v. *Ohio*, 378 U. S. 184, 195 (1964).

Throughout this period, we recognized "the inherent dangers of undertaking to regulate any form of expression." *Miller* v. *California*, 413 U. S., at 23. Consequently, our difficulty was not only to assure that statutes designed to regulate obscene materials sufficiently defined what was prohibited, but to devise substantive limits on what fell within the permissible scope of regulation. In *Miller* v. *California*, *supra*, a majority of the Court agreed that "a state offense must also be limited to works which, taken as a whole, appeal to the prurient interest in sex, which portray sexual conduct in a patently offensive way, and which, taken as a whole, do not have serious literary, artistic, political, or scientific value." 413 U. S., at 24. Over the past decade, we have adhered to the guidelines expressed in *Miller*,[6] which subsequently has been followed in the regulatory schemes of most states.[7]

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[6] *Hamling* v. *United States*, 418 U. S. 87 (1974); *Jenkins* v. *Georgia*, 418

B

The *Miller* standard, like its predecessors, was an accommodation between the state's interests in protecting the "sensibilities of unwilling recipients" from exposure to porno-

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U. S. 153 (1974); *Ward* v. *Illinois*, 431 U. S. 767 (1977); *Marks* v. *United States*, 430 U. S. 188 (1977); *Pinkus* v. *United States*, 436 U. S. 293 (1978).

[7] Thirty-seven States and the District of Columbia have either legislatively adopted or judicially incorporated the *Miller* test for obscenity. Ala. Code § 13A–12–150 (Supp. 1981); Ariz. Rev. Stat. Ann. § 13–3501(2) (1978); Ark. Stat. Ann. § 41–3502(6) (Supp. 1981); Colo. Rev. Stat. § 18–7–101(2) (Supp. 1981); Del. Code Ann., Tit. 11, § 1364 (Supp. 1981); *Lakin* v. *United States*, 363 A. 2d 990 (DCCA 1976); Ga. Code § 26–2101(b) (1978); Haw. Rev. Stat. § 712–1210(6) (Supp. 1981); Idaho Code § 18–4101(A) (1979); Iowa Code § 228.4 (1979) (only child pornography covered); Ind. Code § 35–30–10.1–1(c) (1979); Kan. Stat. Ann. § 21–4301 (2)(a) (1981); Ky. Rev. Stat. § 531.010(3) (1975); La. Rev. Stat. § 14:106(A)(2) & (A)(3) (West Supp. 1982); *Ebert* v. *Md. St. Bd of Censors*, 19 Md. App. 300, 316 A. 2d 536 (1974); Mass. Gen. Laws Ann., ch. 272, § 31 (West Supp. 1982); *People* v. *Neumayer*, 405 Mich. 341, 275 N. W. 2d 230 (1979); *State* v. *Welke*, 298 Minn. 402, 216 N. W. 2d 641 (1974); Mo. Rev. Stat. § 573.010(1) (1979); Neb. Rev. Stat., § 28–807(9) (1979); Nev. Rev. Stat. § 201.235 (1981); N. H. Rev. Stat. Ann. § 650:1(IV) (Supp. 1981); N. J. Stat. Ann. § 2C:34–2 (West Supp. 1981); N. Y. Penal Law § 235.00(1) (1980); N. C. Gen. Stat. § 14–190–1(b) (1981); N. D. Cent. Code § 12.1–27.1–01(4) (1976); *State* v. *Burgun*, 56 Ohio St. 2d 354, 384 N. E. 2d 255 (Ohio 1978); *McCrary* v. *State*, 533 P. 2d 629 (Okla. Crim App. 1974); Ore. Rev. Stat. § 167.087(2) (1981); 18 Pa. Cons. Stat. § 5903(b) (1982); R. I. Gen. Laws § 11–31–1 (1981); S. C. Code § 16–15–260(a) (1981); S. D. Comp. Laws Ann. § 22–24–27(10) (1979); Tenn. Code Ann. § 39–3001(17) (1981); Texas Penal Code Ann. § 43.21(a) (1982); Utah Code Ann. § 76–10–1203(1) (1978); Va. Code § 18.2–372 (1982); 1982 Wash. Laws., Ch. 184, § 1(2).

Four States continue to follow the test approved in *Memoirs* v. *Massachusetts*, 383 U. S. 413 (1966). Calif. Penal Code Ann. § 311(a) (Supp. 1982); Conn. Gen. Stat. § 53a–193 (Supp. 1982); Fla. Stat. § 847.07 (1976); Ill. Rev. Stat. ch. 38, § 11–20(b) (1979). Five States regulate only the disgraphic material and the dangers of censorship inherent in unabashedly content-based laws. Like obscenity statutes, laws directed at the dissemination of child pornography run the risk of suppressing protected expression by allowing the hand of the censor to become unduly heavy. For the following reasons, however, we are persuaded that the States are entitled to greater leeway in the regulation of pornographic depictions of children.

First. It is evident beyond the need for elaboration that a state's interest in "safeguarding the physical and psychological well being of a minor" is "compelling." *Globe Newspapers* v. *Superior Court*, — U. S. —, — (1982). "A democratic society rests, for its continuance, upon the healthy well-rounded growth of young people into full maturity as citizens." *Prince* v. *Massachusetts*, 321 U. S. 158, 168 (1944). Accordingly, we have sustained legislation aimed at protecting the physical and emotional well-being of youth even when the laws have operated in the sensitive area of constitutionally protected rights. In *Prince* v. *Massachusetts*, *supra*, the Court held that a statute prohibiting use of a child to distribute literature on the street was valid notwithstanding the statute's effect on a First Amendment activity. In *Ginsberg* v. *New York*, 390 U. S. 629 (1968), we sustained a New York law protecting children from exposure to nonobscene litera-

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tribution of pornographic material to minors. Me. Rev. Stat. Ann., Tit. 17, § 2911 (Supp. 1981–82); Mont. Code Ann. § 45–8–201 (1981); N. M. Stat. Ann. § 30–37–2 (1980); Vt. Stat. Ann., Tit. 13, § 2802 (1981); W. Va. Code, § 61–8A–2 (1977). Three State obscenity laws do not fall into any of the above categories. Miss. Code Ann. § 97–29–33 (1973), declared invalid in *ABC Interstate Theatres, Inc.* v. *State*, 325 So. 2d 123 (Miss. 1976); Wisc. Stat. § 944.21(1)(a) (1977), declared invalid in *State* v. *Princess Cinema of Milwaukee, Inc.*, 96 Wis. 2d 646, 292 N. W. 2d 807 (1980); Wyo. Stat. § 6–5–303 (1977.) Alaska has no current state obscenity law.

A number of States employ a different obscenity standard with respect to material distributed to children. See, *e. g.*, Fla. Stat. § 847.0125 (1976).

ture. Most recently, we held that the government's interest in the "well-being of its youth" justified special treatment of indecent broadcasting received by adults as well as children. *FCC* v. *Pacifica Foundation*, 438 U. S. 726 (1978).

The prevention of sexual exploitation and abuse of children constitutes a government objective of surpassing importance. The legislative findings accompanying passage of the New York laws reflect this concern:

> "There has been a proliferation of children as subjects in sexual performances. The care of children is a sacred trust and should not be abused by those who seek to profit through a commercial network based on the exploitation of children. The public policy of the state demands the protection of children from exploitation through sexual performances." Laws of N.Y., 1977, ch. 910, § 1.[8]

We shall not second-guess this legislative judgment. Respondent has not intimated that we do so. Suffice it to say that virtually all of the States and the United States have passed legislation proscribing the production of or otherwise combatting "child pornography." The legislative judgment, as well as the judgment found in the relevant literature, is that the use of children as subjects of pornographic materials is harmful to the physiological, emotional, and mental health of the child.[9] That judgment, we think, easily passes muster under the First Amendment.

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[8] In addition, the legislature found:

"[T]he sale of these movies, magazines, and photographs depicting the sexual conduct of children to be so abhorrent to the fabric of our society that it urges law enforcement officers to aggressively seek out and prosecute both the peddlers of this filth by vigorously applying the sanctions contained in this act." Law of N.Y., 1977, ch. 910, § 1.

[9] "The use of children as . . . subjects of pornographic materials is very harmful to both the children and the society as a whole." S. Rep. No. 95-438, p. 5 (1978). It has been found that sexually exploited children are

Second. The distribution of photographs and films depicting sexual activity by juveniles is intrinsically related to the sexual abuse of children in at least two ways. First, the materials produced are a permanent record of the children's participation and the harm to the child is exacerbated by their circulation.[10] Second, the distribution network for child por-

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unable to develop healthy affectionate relationships in later life, have sexual dysfunctions, and have a tendency to become sexual abusers as adults. Schoettle, Child Exploitation: A Study of Child Pornography, 19 J. Am. Acad. Child Psych. 289, 296 (1980) (hereafter cited as Child Exploitation); Schoettle, Treatment of the Child Pornography Patient, 137 Am. J. Psych. 1109, 1110 (1980); Densen-Gerner, Child Prostitution and Child Pornography: Medical, Legal and Societal Aspects of the Commercial Exploitation of Children, reprinted in U. S. Dept. of Health and Human Services, Sexual Abuse of Children: Selected Readings at 80 (1980) (hereafter cited as Commercial Exploitation) (sexually exploited children predisposed to self-destructive behavior such as drug and alcohol abuse or prostitution). See generally A. Burgess & L. Holmstrom, Accessory-to-Sex: Pressure, Sex and Secrecy, in Burgess, Sexual Assault of Children and Adolsecents 85, 94 (1978); V. DeFrancis, Protecting the Child Victim of Sex Crimes Committed by Adults, 169 (1969); Ellerstein & Canavan, Sexual Abuse of Boys, 134 Am. J. Diseases of Children 255, 256–257 (1980); Finch, Adult Seduction of the Child: Effects on the Child, 7 Med. Aspects of Human Sexuality 170, 185 (1973); Groth, Sexual Trauma in the Life Histories of Rapists and Child Molesters, 4 Victimology 10 (1979). Sexual molestation by adults is often involved in the production of child sexual performances. Sexual Exploitation of Children, A Report to Illinois General Assembly by the Illinois Legislative Investigatory Comm'n at 30–31 (1980) (hereafter cited as Ill. Comm'n). When such performances are recorded and distributed, the child's privacy interests are also invaded. See n. 10, *infra.*

[10] As one authority has explained:

"Pornography poses an even greater threat to the child victim than does sexual abuse of prostitution. Because the child's actions are reduced to a recording, the pornography may haunt him in future years, long after the original misdeed took place. A child who has posed for the camera must go through life knowing that the recording is circulating within the mass distribution system for child pornography." Shouvlin, Preventing the Sexual Exploitation of Children: A Model Act, 17 Wake Forest L. Rev. 535, 545 (1981) nography must be closed if the production of material which requires the sexual exploitation of children is to be effectively controlled. Indeed, there is no serious contention that the legislature was unjustified in believing that it is difficult, if not impossible, to halt the exploitation of children by pursuing only those who produce the photographs and movies. While the production of pornographic materials is a low-profile, clandestine industry, the need to market the resulting products requires a visible apparatus of distribution. The most expeditious if not the only practical method of law enforcement may be to dry up the market for this material by imposing severe criminal penalties on persons selling, advertising, or otherwise promoting the product. Thirty-five States and Congress have concluded that restraints on the distribution of pornographic materials are required in order to effectively combat the problem, and there is a body of literature and testimony to support these legislative conclusions.[11] Cf. *United States* v. *Darby*, 312 U. S. 100 (1941) (upholding federal restrictions on sale of goods manufactured in violation of Fair Labor Standards Act).

Respondent does not contend that the State is unjustified in pursuing those who distribute child pornography. Rather, he argues that it is enough for the State to prohibit the distribution of materials that are legally obscene under the *Miller* test. While some States may find that this approach properly accommodates its interests, it does not follow that that the First Amendment prohibits a State from going further. The *Miller* standard, like all general definitions of what may be banned as obscene, does not reflect the State's particular and more compelling interest in prosecuting those who promote the sexual exploitation of children. Thus, the question under the *Miller* test of whether a work, taken as a whole, appeals to the prurient interest of the average person bears no connection to the issue of whether a child has been physically or psychologically harmed in the production of the work. Similarly, a sexually explicit depiction need not be "patently offensive" in order to have required the sexual exploitation of a child for its production. In addition, a work which, taken on the whole, contains serious literary, artistic, political, or scientific value may nevertheless em-

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See also Schoettle, Child Exploitation, at 292 ("[I]t is the fear of exposure and the tension of keeping the act secret that seem to have the most profound emotional repercussions"); Note, Protection of Children from Use in Pornography: Toward Constitutional and Enforceable Legislation, 12 J. 295, 301 (1979) U. Mich. J. Law Reform (thereafter cited as Use in Pornography) (interview with child psychiatrist) ("the victims knowledge of publication of the visual material increases the emotional and psychic harm suffered by the child.").

Thus, distribution of the material violates "the individual interest in avoiding disclosure of personal matters." *Whalen* v. *Roe*, 429 U. S. 589, 599–600 (1977) (footnotes omitted). Repondents cannot undermine the force of the privacy interests involved here by looking to *Cox Broadcasting Corp* v. *Cohn*, 420 U. S. 469 (1975) and *Smith* v. *Daily Mail Publishing Co.*, 443 U. S. 97 (1979), cases protecting the right of newspapers to publish, respectively, the identity of a rape victim and a youth charged as a juvenile offender. Those cases only stand for the proposition that "if a newspaper lawfully obtains truthful information about a matter of public significance, the state officials may not constitutionally punish publication of the information absent a need of the highest order."

[11] See Sexual Exploitation of Children, Hearings before the Subcommittee to Ivestigate Juvenile Delinquency of the House Judiciary Comm., 95th Cong., 1st Sess., 34 (1977) (statement of Charles Rembar) ("It is an impossible prosecutorial job to try to get at the acts themselves."); *id.*, at 11 (statement of Frank Osanka, Professor of Social Justice and Sociology) ("[W]e have to be very careful . . . that we don't take comfort in the existence of statutes that are on the books in the connection with the use of children in pornography . . . There are usually no witnesses to these acts of producing pornography."); *id.*, at 69 (statement of Investigator Lloyd Martin, Los Angeles Police department) (producers of child pornography use false names making difficult the tracing of material back from distributor). See also L. Tribe, American Constitutional Law, 666, n. 62 (1978); Pope, Child Pornography: A New Role for the Obscenity Doctrine, 1978 U. Ill. L. Forum, 711, 716, n. 29; Note, Use in Pornography at 315 ("passage of criminal laws aimed at producers without similar regulation of distributors will arguably shift the production process further underground.").

body the hardest core of child pornography. "It is irrelevant to the child [who has been abused] whether or not the material . . . has a literary, artistic, political, or social value." Memorandum of Assemblyman Lasher in Support of § 263.15. We therefore cannot conclude that the *Miller* standard is a satisfactory solution to the child pornography problem.[12]

Third. The advertising and selling of child pornography provides an economic motive for and is thus an integral part of the production of such materials, an activity illegal throughout the nation.[13] "It rarely has been suggested that the constitutional freedom for speech and press extends its immunity to speech or writing used as an integral part of conduct in violation of a valid criminal statute." *Giboney* v. *Empire Storage & Ice Co.*, 336 U. S. 490, 498 (1949).[14] We note

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[12] In addition, legal obscenity under *Miller* is a function of "contemporary community standards." 413 U. S., at 24. "It is neither realistic nor constitutionally sound to read the First Amendment as requiring that the people of Maine or Missippi accept public depiction of conduct found tolerable in Las Vegas or New York City." *Id.*, at 32. It would be equally unrealistic to equate a community's toleration for sexually oriented material with the permissible scope of legislation aimed at protecting children from sexual exploitation. Furthermore, a number of States rely on stricter obscenity tests, see note 7 *supra*, under which successful prosecution for child pornography may be even more difficult.

[13] One state commision studying the problem declared, "The act of selling these materials is guaranteeing that there will be additional abuse of children." Texas House Select Comm. on Child Pornography, Its Related Causes and Control 44 (1978). See also Densen-Gerber, Commercial Exploitation at 80 ("Printed materials cannot be isolated or removed from the process involved in developing them.").

[14] In *Giboney*, a unanimous Court held that labor unions could be restrained from picketing a firm in support of a secondary boycott which a State had validly outlawed. In *Pittsburgh Press Co.* v. *Pittsburgh Comm'n on Human Relations*, 413 U. S. 376 (1973), the Court allowed an injunction against a newspaper's furtherance of illegal sex discrimination by placing of job advertisements in gender-designated columns. The Court stated:

"Any First Amendment interest which might be served by advertising an that were the statutes outlawing the employment of children in these films and photographs fully effective, and the constitutionality of these laws have not been questioned, the First Amendment implications would be no greater than that presented by laws against distribution: enforceable production laws would leave no child pornography to be marketed.[15]

Fourth. The value of permitting live performances and photographic reproductions of children engaged in lewd sexual conduct is exceedingly modest, if not *de minimis.* We consider it unlikely that visual depictions of children performing sexual acts or lewdly exhibiting their genitals would often constitute an important and necessary part of a literary performance or scientific or educational work. As the trial court in this case observed, if it were necessary for literary or artistic value, a person over the statutory age who perhaps looked younger could be utilized.[16] Simulation outside of the prohibition of the statute could provide another alternative. Nor is there is any question here of censoring a particular literary theme or portrayal of sexual activity. The First Amendment interest is limited to that of rendering the portrayal somewhat more "realistic" by utilizing or photographing children.

Fifth. Recognizing and classifying child pornography as a

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ordinary commercial proposal and which might arguably outweigh the government interest supporting the regulation is altogether absent when the commercial activity is illegal and the restriction on advertising is incidental to a valid limitation on economic activity." *Id.* at 389.

[15] In this connection we note that 18 U. S.C § 2251 (1979 Supp.), making it a federal offense for anyone to use children under the age of 16 in the production of pornographic materials, embraces all "sexually explicit conduct" without imposing an obscenity test. In addition, half of the state laws imposing criminal liability on the producer do not require the visual material to be legally obscene. Note, Use in Pornography, at 307–308 (1979).

[16] 96 Misc. 2d at 676, 409 N.Y.S. 2d at 637. This is not merely a hypothetical possibility. See Brief for Petitioner at 25 and examples cited therein.

category of material outside the protection of the First Amendment is not incompatible with our earlier decisions. "The question whether speech is, or is not protected by the First Amendment often depends on the content of the speech." *Young* v. *American Mini Theatres*, 427 U. S. 50, 66 (Opinion of JUSTICE STEVENS, joined by THE CHIEF JUSTICE, JUSTICE WHITE, and JUSTICE REHNQUIST). See also *FCC* v. *Pacifica Foundation*, 438 U. S. 726, 742–748 (1978) (Opinion of JUSTICE STEVENS, joined by THE CHIEF JUSTICE, JUSTICE WHITE, and JUSTICE REHNQUIST). "It is the content of an utterance that determines whether it is a protected epithet or an unprotected 'fighting comment.'" *Young* v. *American Mini Theatres*, *supra*, at 66. See *Chaplinsky* v. *New Hampshire*, 315 U. S. 568 (1942). Leaving aside the special considerations when public officials are the target, *New York Times* v. *Sullivan*, 376 U. S. 254 (1964), a libelous publication is not protected by the Constitution. *Beauharnais* v. *Illinois*, 343 U. S. 250 (1952). Thus, it is not rare that a content-based classification of speech has been accepted because it may be appropriately generalized that within the confines of the given classification, the evil to be restricted so overwhelmingly outweighs the expressive interests, if any, at stake, that no process of case-by-case adjudication is required. When a definable class of material, such as that covered by §263.15, bears so heavily and pervasively on the welfare of children engaged in its production, we think the balance of competing interests is clearly struck and that it is permissible to consider these materials as without the protection of the First Amendment.

C

There are, of course, limits on the category of child pornography which, like obscenity, is unprotected by the First Amendment. As with all legislation in this sensitive area, the conduct to be prohibited must be adequately defined by the applicable state law, as written or authoritatively construed. Here the nature of the harm to be combatted requires that the state offense be limited to works that *visually* depict sexual conduct by children below a specified age.[17] The category of "sexual conduct" proscribed must also be suitably limited and described.

The test for child pornography is separate from the obscenity standard enunciated in *Miller*, but may be compared to it for purpose of clarity. The *Miller* formulation is adjusted in the following respects: A trier of fact need not find that the material appeals to the prurient interest of the average person; it is not required that sexual conduct portrayed be done so in a patently offensive manner; and the material at issue need not be considered as a whole. We note that the distribution of descriptions or other depictions of sexual conduct, not otherwise obscene, which do not involve live performance or photographic or other visual reproduction of live performances, retains First Amendment protection. As with obscenity laws, criminal responsibility may not be imposed without some element of scienter on the part of the defendant. *Smith* v. *California*, 361 U. S. 147 (1959); *Hamling* v. *United States*, 418 U. S. 87 (1974).

D

Section 263.15's prohibition incorporates a definition of sexual conduct that comports with the above-stated principles. The forbidden acts to be depicted are listed with sufficient precision and represent the kind of conduct that, if it were the theme of a work, could render it legally obscene: "actual or simulated sexual intercourse, deviate sexual intercourse, sexual bestiality, masturbation, sadomasochistic abuse, or lewd exhibition of the genitals." § 263.3. The term "lewd exhibition of the genitals" is not unknown in this area and, indeed, was given in *Miller* as an example of a permissible regulation. 413 U. S., at 25. A performance is defined only to include live or visual depictions: "any play, motion picture, photograph or dance . . . or other visual representation before an audience." § 263.4. Section 263.15 expressly includes a scienter agreement.

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[17] Sixteen States define a child as a person under age 18. Four States define a child as under 17 years old. The federal law and 16 States, including New York, define a child as under 16. Illinois and Nebraska define define a child as a person under age 16 or who appears as a prepubescent. Ill. Ann. Stat. ch. 38 § 11-20a (1978); Neb. Rev. Stat. § 28-1463 (Supp. 1978). Indiana defines a child as one who is or appears to be under 16. Ind. Code. §§ 35-30-10.1-2 to 3 (Supp. 1978). Kentucky provides for two age classifications (16 and 18) and varies punishment according to the victim's age. Ky. Rev. Stat. §§ 531.300-.370 (Supp. 1978). See Note, Use in Pornography, at 307, n. 71 (collecting statutes).

We hold that § 263.15 sufficiently describes a category of material the production and distribution of which is not entitled to First Amendment protection. It is therefore clear that there is nothing unconstitutionally "underinclusive" about a statute that singles out this category of material for proscription.[18] It also follows that the State is not barred by the First Amendment from prohibiting the distribution of unprotected materials produced outside the State.[19]

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[18] *Erznoznik* v. *City of Jacksonville*, 422 U. S. 205 (1975), relied upon by the Court of Appeals, struck down a law against drive-in theaters showing nude scenes if movies could be seen from a public place. Since nudity, without more is protected expression, *id.*, at 213, we proceeded to consider the underinclusiveness of the ordinance. The Jacksonville ordinance impermissibly singled out movies with nudity for special treatment while failing to regulate other protected speech which created the same alleged risk to traffic. Today, we hold that child pornography as defined in § 263.15 is unprotected speech subject to content-based regulation. Hence, it cannot be underinclusive or unconstitutional for a State to do precisely that.

[19] It is often impossible to determine where such material is produced. The Senate Report accompanying federal child pornography legislation stressed that "it is quite common for photographs or films made in the United States to be sent to foreign countries to be reproduced and then returned to this country in order to give the impression of foreign origin." S. Rep. No. 95-438, p. 6 (1978). In addition, States have not limited their distribution laws to material produced within their own borders because

III

It remains to address the claim that the New York statute is unconstitutionally overbroad because it would forbid the distribution of material with serious literary, scientific or educational value or material which does not threaten the harms sought to be combatted by the State. Respondent prevailed on that ground below, and it is to that issue that we now turn.

The New York Court of Appeals recognized that overbreadth scrutiny has been limited with respect to conduct-related regulation, *Broadrick* v. *Oklahoma*, 413 U. S. 601 (1973), but it did not apply the test enunciated in *Broadrick* because the challenged statute, in its view, was directed at "pure speech." The court went on to find that §263.15 was fatally overbroad: "[T]he statute would prohibit the showing of any play or movie in which a child portrays a defined sexual act, real or simulated, in a nonobscene manner. It would also prohibit the sale, showing, or distributing of medical or educational materials containing photographs of such acts. Indeed, by its terms, the statute would prohibit those who oppose such portrayals from providing illustrations of what they oppose." 52 N.Y. 2d, at 678, 422 N.E. 2d, at 525.

While the construction that a state court gives a state statute is not a matter subject to our review, *Wainright* v. *Stone*, 414 U. S. 21, 22–23 (1973); *Gooding* v. *Wilson*, 405 U. S. 518, 520 (1972), this Court is the final arbiter of whether the federal constitution necessitated the invalidation of a state law. It is only through this process of review that we may correct erroneous applications of the Constitution that err on the side of an overly broad reading of our doctrines and precedents,

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the maintenance of the market itself "leaves open the financial conduit by which the production of such material is funded and materially increases the risk that [local] children will be injured." 52 N.Y. 2d at 688; 422 N.E. 2d at 531 (Judge Jason, dissenting).

as well as state court decisions giving the Constitution too little shrift. A state court is not free to avoid a proper facial attack on federal constitutional grounds. *Bigelow* v. *Virginia*, 421 U. S. 809, 817 (1975). By the same token, it should not be compelled to entertain an overbreadth attack when not required to do so by the Constitution.

A

The traditional rule is that a person to whom a statute may constitutionally be applied may not challenge that statute on the ground that it may conceivably be applied unconstitutionally to others in situations not before the Court. *Broadrick* v. *Oklahoma*, 413 U. S., at 610; *United States* v. *Raines*, 362 U. S. 17, 21 (1960); *Carmichael* v. *Southern Coal & Coke Co.*, 301 U. S. 495, 513 (1937); *Yazoo & M. V. R. Co.* v. *Jackson Vinegar Co.*, 226 U. S. 217, 219–220 (1912). In *Broadrick*, we recognized that this rule reflect two cardinal principles of our constitutional order: the personal nature of constitutional rights, *McGowan* v. *Maryland*, 366 U. S. 420, 429 (1961), and prudential limitations on constitutional adjudication.[20] In *United States* v. *Raines*, *supra*, at 21, we noted the "incontrovertible proposition" that it "would indeed be undesirable for this Court to consider every conceivable situation which might possibly arise in the application of complex and comprehensive legislation," (quoting *Barrows* v. *Jackson*, 346 U. S. 249, 256 (1953)). By focusing on the factual situation before us, and similar cases necessary for development of a constitutional rule,[21] we face "flesh-and-blood"[22] legal problems with data "relevant and adequate to an informed judgment."[23] This practice also fulfills a valuable institutional purpose: it allows state courts the opportunity to construe a law to avoid constitutional infirmities.

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[20] In addition to prudential restraints, the traditional rule is grounded in Article III limits on the jurisdiction of federal courts to actual cases and controversies.

"This Court, as is the case with all federal courts, 'has no jurisdiction to pronounce any statute, either of a State or of the United States, void, because irreconcilable with the Constitution, except as it is called upon to adjudge the legal rights of litigants in actual controversies. In the exercise of that jurisdiction, it is bound by two rules to which it has rigidly adhered, one, never to anticipate a question of constitutional law in advance of the necessity of deciding it; the other never to formulate a rule of constitutional law broader than is required by the precise facts to which it is applied.' *Liverpool, New York & Philadelphia S.S. Co.* v. *Commissioners of Emigration*, 113 U. S. 33, 39." *United States* v. *Raines*, 362 U. S. 17, 21 (1960).

What has come to be known as the First Amendment overbreadth doctrine is one of the few exceptions to this principle and must be justified by "weighty countervailing policies." *United States* v. *Raines*, *supra* at 22–23. The doctrine is predicated on the sensitive nature of protected expression: "persons whose expression is constitutionally protected may well refrain from exercising their rights for fear of criminal sanctions by a statute susceptible of application to protected expression." *Village of Schaumburg* v. *Citizens for a Better Environment*, 444 U. S. 620, 634 (1980); *Gooding* v. *Wilson*, 405 U. S. 518, 521 (1972). It is for this reason that we have allowed persons to attack overly broad statutes even though the conduct of the person making the attack is clearly unprotected and could be proscribed by a law drawn with the requsite specificity. *Dombrowski* v. *Pfister*, 380 U. S. 479, 486 (1965); *Thornhill* v. *Alabama*, 310 U. S. 88, 97–98 (1940); *United States* v. *Raines*, *supra* at 21–22; *Gooding* v. *Wilson*, *supra*, at 521.

The scope of the First Amendment overbreadth doctrine, like most exceptions to established principles, must be carefully tied to the circumstances in which facial invalidation of a statute is truly warranted. Because of the wide-reaching effects of striking a statute down on its face at the request of one whose own conduct may be punished despite the First Amendment, we have recognized that the overbreadth doctrine is "strong medicine" and have employed it with hesitation, and then "only as a last resort." *Broadrick*, 413 U. S., at 613. We have, in consequence, insisted that the overbreadth involved be "substantial" before the statute involved will be invalidated on its face.[24]

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[21] Overbreadth challenges are only one type of facial attack. A person whose activity may be constitutionally regulated nevertheless may argue that the statute under which he is convicted or regulated is invalid on its face. See, *e. g.* *Terminello* v. *City of Chicago*, 337 U. S. 1, 5 (1949). See generally Monaghan, Overbreadth, 1981 Sup. Ct. Review 1, 10–14.

[22] A. Bickel, The Least Dangerous Branch 115–116 (1962);

[23] Frankfurter & Hart, The Business of the Supreme Court at October Term 1934, 49 Harv. L. Rev. 68, 95–96 (1935).

In *Broadrick*, we explained the basis for this requirement:

> [T]he plain import of our cases is, at the very least, that facial overbreadth adjudication is the exception to our traditional rules of practice and that its function, a limited one at the outset, attenuates as the otherwise protected behavior that it forbids the State to sanction moves from "pure speech" toward conduct and that conduct—even if expressive—falls within the scope of otherwise valid criminal laws that reflect legitimate state interests in maintaining comprehensive controls over harmful, constitutionally unprotected conduct. Al-

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[24] When a federal court is dealing with a federal statute challenged as overbroad, it should, of course, construe the statute to avoid constitutional problems, if the statute is subject to such a limiting construction. *Crowell* v. *Benson*, 285 U. S. 22, 62 (1932). Accord, *e. g.*, *Haynes* v. *United States*, 390 U. S. 85, 92 (1968) (dictum); *Schnieder* v. *Smith*, 390 U. S. 17, 27 (1968); *United States* v. *Rumely*, 345 U. S. 41, 45 (1953); *Ashwander* v. *Tennessee Valley Authority*, 297 U. S. 288, 348 (1936) (Brandeis, J. concurring). Furthermore, if the federal statute is not subject to a narrowing construction and is impermissibly overbroad, it nevertheless should not be stricken down on its face; if it is severable, only the unconstitutional portion is to be invalidated. *United States* v. *Thirty-Seven Photographs*, 402 U. S. 363 (1971).

A state court is also free to deal with a state statute in the same way. If the invalid reach of the law is cured, there is no longer reason for proscribing the statute's application to unprotected conduct. Here, of course, we are dealing with a state statute on direct review of a state court decision that has construed the statute. Such a construction is binding on us.

> though such laws, if too broadly worded, may deter protected speech to some unknown extent, there comes a point where that effect—at best a prediction—cannot, with confidence, justify invalidating a statute on its face and so prohibiting a State from enforcing the statute against conduct that is admittedly within its power to proscribe. Cf. *Alderman* v. *United States*, 394 U. S. 165, 174–175 (1969)." 413 U. S., at 615.

We accordingly held that "particularly where conduct and not merely speech is involved, we believe that the overbreadth of a statute must not only be real, but substantial as well, judged in relation to the statute's plainly legitimate sweep." *Ibid.*[25]

Broadrick was a regulation involving restrictions on political campaign activity, an area not considered "pure speech," and thus it was unnecessary to consider the proper overbreadth test when a law arguably reaches traditional forms of expression such as books and films. As we intimated in *Broadrick*, the requirement of substantial overbreadth extended "at the very least" to cases involving conduct plus speech. This case, which poses the question squarely, convinces us that the rationale of *Broadrick* is sound and should be applied in the present context involving the harmful employment of children to make sexually explicit materials for distribution.

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[25] *Parker* v. *Levy*, 417 U. S. 733, 760 (1974) ("This Court has . . . repeatedly expressed its reluctance to strike down a statute on its face where there were a substantial number of situations to which it might be validly applied. Thus, even if there are marginal applications in which a statute would infringe on First Amendment values, facial invalidation is inappropriate if the 'remainder of the statute . . . covers a whole range of easily identifiable and constitutionally proscribable conduct . . . conduct . . .' *CSC* v. *Letter Carriers*, 413 U. S. 548, 580–581 (1973)."). See Bogen, First Amendment Ancillary Doctrines, 4 Maryland L. Rev. 679, 712–714 (1978); Note, First Amendment Overbreadth Doctrine, 83 Harv. L. Rev. 844, 860–861 (1970).

The premise that a law should not be invalidated for overbreadth unless it reaches a substantial number of impermissible applications is hardly novel. On most occasions involving facial invalidation, the Court has stressed the embracing sweep of the statute over protected expression.[26] Indeed, JUSTICE BRENNAN observed in his dissenting opinion in *Broadrick*:

> "We have never held that a statute should be held invalid on its face merely because it is possible to conceive of a single impermissible application, and in that sense a requirement of substantial overbreadth is already implicit in the doctrine." 413 U. S., at 630.

The requirement of substantial overbreadth is directly derived from the purpose and nature of the doctrine. While a sweeping statute, or one incapable of limitation, has the potential to repeatedly chill the exercise of expressive activity by many individuals, the extent of deterrence of protected speech can be expected to decrease with the declining reach of the regulation.[27] This observation appears equally applicable to the publication of books and films as it is to activities, such as picketing or participation in election campaigns, which have previously been categorized as involving conduct plus speech. We see no appreciable difference between the position of a publisher or bookseller in doubt as to the reach of New York's child pornography law and the situation faced by the Oklahoma state employees with respect to that state's restriction on partisan political activity. Indeed, it could reasonably be argued that the bookseller, with an economic incentive to sell materials that may fall within the statute's scope, may be less likely to be deterred than the employee who wishes to engage in political campaign activity. Cf. *Bates* v. *State Bar of Arizona*, 433 U. S. 350, 380–381 (1977) (overbreadth analysis inapplicable to commercial speech).

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[26] In *Gooding* v. *Wilson*, 405 U. S. 518, 527 (1972), the Court's invalidation of a Georgia statute making it a misdemeanor to use "opprobrious words or abusive language tending to cause a breach of the peace" followed from state judicial decisions indicating that "merely to speak words offensive to some who hear them" could constitute a "breach of the peace." Cases invalidating laws requiring members of a "subversive organization" to take a loyalty oath, *Baggett* v. *Bullitt*, 377 U. S. 360 (1964), or register with the government, *Dombrowski* v. *Pfister*, 380 U. S. 479 (1965), can be explained on the basis that the laws involved, unlike § 263.15, defined no central core of constitutionally regulable conduct; the entire scope of the laws was subject to the uncertainties and vagaries of prosecutorial discretion. See also *Bigelow* v. *Virginia*, 421 U. S. 809, 817 (1975) ("the fact of this case well illustrate 'the statute's potential for sweeping and improper applications.'") (citation omitted); *NAACP* v. *Button*, 371 U. S. 415, 433 (1963) ("We read the decree of the Virginia Supreme Court of Appeals . . . as proscribing any arrangement by which prospective litigants are advised to seek the assistance of particular attorneys."); *Thornhill* v. *Alabama*, 310 U. S. 88, 97 (1940) (the statute "does not aim specifically at evils within the allowable area of state control but, on the contrary, sweeps within its ambit other activities that in ordinary circumstances constitute an exercise of freedom of speech or of the press.").

This requirement of substantial overbreadth may justifiably be applied to statutory challenges which arise in defense of a criminal prosecution as well as civil enforcement or actions seeking a declaratory judgment. Cf. *Parker* v. *Levy*, 417 U. S. 733, 760 (1974). Indeed, the Court's practice when confronted with ordinary criminal laws that are sought to be applied against protected conduct is not to invalidate the law *in toto*, but rather to reverse the particular conviction. *Cantwell* v. *Connecticut*, 310 U. S. 296 (1940); *Edwards* v. *South Carolina*, 372 U. S. 229 (1973). We recognize, however, that the penalty to be imposed is relevant in determining whether demonstrable overbreadth is substantial. We simply hold that the fact that a criminal prohibition is involved does not obviate the need for the inquiry or *a priori* warrant a finding of substantial overbreadth.

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[27] "A substantial overbreadth rule is implicit in the chilling effect rationale . . . the presumption must be that only substantially overbroad laws set up the kind and degree of chill that is judicially cognizable." Moreover, "without a substantial overbreadth limitation, review for overbreadth would be draconian indeed. It is difficult to think of a law that is utterly devoid of potential for unconstitutionality in some conceivable application." Note, First Amendment Overbreadth Doctrine, 83 Harv. L. Rev., at 859 and n. 61.

B

Applying these principles, § 263.15 is not substantially overbroad. We consider this the paradigmatic case of a state statute whose legitimate reach dwarfs its arguably impermissible applications. New York, as we have held, may constitutionally prohibit dissemination of material specified in § 263.15. While the reach of the statute is directed at the hard core of child pornography, the Court of Appeals was understandably concerned that some protected expression, ranging from medical textbooks to pictorials in National Geographic would fall prey to the statute. How often, if ever, it may be necessary to employ children to engage in conduct clearly within the reach of the § 263.15 in order to produce educational, medical or artistic works cannot be known with certainty. Yet we seriously doubt, and it has not been suggested, that these arguably impermissible applications of the statute amount to more than a tiny fraction of the materials within the statute's reach. Nor will we assume that the New York courts will widen the possibly invalid reach of the statute by giving an expansive construction to the proscription on "lewd exhibition[s] of the genitals." Under these circumstances, § 263.15 is "not substantially overbroad and whatever overbreadth exists should be cured through case-by-case analysis of the fact situations to which its sanctions, assertedly, may not be applied." *Broadrick* v. *Oklahoma*, 413 U. S., at 615–616.

IV

Because § 263.15 is not substantially overbroad, it is unnecessary to consider its application to material that does not depict sexual conduct of a type that New York may restrict consistent with the First Amendment. As applied to Paul Ferber and to others who distribute similar material, the statute does not violate the First Amendment as applied to the States through the Fourteenth.[28] The decision of the New York Court of Appeals is reversed and the case is remanded to that Court for further proceedings not inconsistent with this opinion.

So ordered.

JUSTICE BLACKMUN concurs in the result.

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[28] There is no argument that the films sold by respondent do not fall squarely within the category of activity we have defined as unprotected. Therefore, no independent examination of the material is necessary to assure ourselves that the judgment here "does not constitute a forbidden intrusion on the field of free expression." *New York Times* v. *Sullivan*, 376 U. S. 254, 285 (1964).

[illegible]

clearly within the reach of § 263.15 in order to produce educational, medical, or artistic works cannot be known with certainty. Yet we seriously doubt, and it has not been suggested, that these arguably impermissible applications of the statute amount to more than a tiny fraction of the materials within the statute's reach. Nor will we assume that the New York courts will widen the possibly invalid reach of the statute by giving an expansive construction to the proscription on "lewd exhibition[s] of the genitals." Under these circumstances, § 263.15 is "not substantially overbroad and . . . whatever overbreadth may exist should be cured through case-by-case analysis of the fact situations to which its sanctions, assertedly, may not be applied." *Broadrick v. Oklahoma*, 413 U.S., at 615-616.

[illegible]

SUPREME COURT OF THE UNITED STATES

No. 81-55

NEW YORK, PETITIONER *v.* PAUL IRA FERBER

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF NEW YORK

[July 2, 1982]

JUSTICE O'CONNOR, concurring.

Although I join the Court's opinion, I write separately to stress that the Court does not hold that New York must except "material with serious literary, scientific or educational value," *ante*, at 19, from its statute. The Court merely holds that, even if the First Amendment shelters such material, New York's current statute is not sufficiently overbroad to support respondent's facial attack. The compelling interests identified in today's opinion, see *ante*, at 9–16, suggest that the Constitution might in fact permit New York to ban knowing distribution of works depicting minors engaged in explicit sexual conduct, regardless of the social value of the depictions. For example, a 12-year-old child photographed while masturbating surely suffers the same psychological harm whether the community labels the photograph "edifying" or "tasteless." The audience's appreciation of the depiction is simply irrelevant to New York's asserted interest in protecting children from psychological, emotional, and mental harm.

An exception for depictions of serious social value, moreover, would actually increase opportunities for the content-based censorship disfavored by the First Amendment. As drafted, New York's statute does not attempt to suppress the communication of particular ideas. The statute permits discussion of child sexuality, forbidding only attempts to render the "portrayal[s] somewhat more 'realistic' by utilizing or photographing children." *Ante*, at 15. Thus, the statute attempts to protect minors from abuse without attempting to restrict the expression of ideas by those who might use children as live models.

On the other hand, it is quite possible that New York's statute is overbroad because it bans depictions that do not actually threaten the harms identified by the Court. For example, clinical pictures of adolescent sexuality, such as those that might appear in medical textbooks, might not involve the type of sexual exploitation and abuse targeted by New York's statute. Nor might such depictions feed the poisonous "kiddie porn" market that New York and other States have attempted to regulate. Similarly, pictures of children engaged in rites widely approved by their cultures, such as those that might appear in issues of *National Geographic*, might not trigger the compelling interests identified by the Court. It is not necessary to address these possibilities further today, however, because this potential overbreadth is not sufficiently substantial to warrant facial invalidation of New York's statute.

SUPREME COURT OF THE UNITED STATES

No. 81-55

NEW YORK, PETITIONER *v.* PAUL IRA FERBER

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS OF NEW YORK

[July 2, 1982]

JUSTICE BRENNAN, with whom JUSTICE MARSHALL joins, concurring in the judgment.

I agree with much of what is said in the Court's opinion. As I made clear in the opinion I delivered for the Court in *Ginsburg* v. *New York*, 390 U. S. 629 (1968), the State has a special interest in protecting the well-being of its youth. *Id.*, at 638–641. See also *Globe Newspapers* v. *Superior Court*, —— U. S. ——, —— (1982) (slip. op. at 11). This special and compelling interest, and the particular vulnerability of children, afford the State the leeway to regulate pornographic material, the promotion of which is harmful to children, even though the State does not have such leeway when it seeks only to protect consenting adults from exposure to such material. *Ginsburg* v. *New York*, *supra*, at 637, 638 n. 6, 642–643, n. 10. See also *Jacobellis* v. *Ohio*, 378 U. S. 184, 195 (1964) (opinion of BRENNAN, J.). I also agree with the Court that the "tiny fraction", *ante*, at 25, of material of serious artistic, scientific or educational value that could conceivably fall within the reach of the statute is insufficient to justify striking the statute on the grounds of overbreadth. See *Broadrick* v. *Oklahoma*, 413 U. S. 601, 630 (1973) (BRENNAN, J., dissenting).

But in my view application of §263.15 or any similar statute to depictions of children that in themselves do have serious literary, artistic, scientific or medical value, would violate the First Amendment. As the Court recognizes, the limited classes of speech, the suppression of which does not raise serious First Amendment concerns, have two attributes. They are of exceedingly "slight social value," and the State has a compelling interest in their regulation. See *Chaplinsky* v. *New Hampshire*, 315 U. S. 568, 571–572 (1942). The First Amendment value of depictions of children that are in themselves serious contributions to art, literature or science, is, by definition, simply not "*de minimis*." See *ante*, at 14. At the same time, the State's interest in suppression of such materials is likely to be far less compelling. For the Court's assumption of harm to the child resulting from the "permanent record" and "circulation" of the child's "participation," *ante*, at 10, lacks much of its force where the depiction is a serious contribution to art or science. The production of materials of serious value is not the "low-profile clandestine industry" that according to the Court produces purely pornogrphic materials. See *ante*, at 11. In short, it is inconceivable how a depiction of a child that is itself a serious contribution to the world of art or literature or science can be deemed "material outside the protection of the First Amendment." See *ante*, at 15.

I, of course, adhere to my view that, in the absence of exposure, or particular harm, to juveniles or unconsenting adults the State lacks power to suppress sexually oriented materials. See, *e. g.*, *Paris Adult Theatre I* v. *Slaton*, 413 U. S. 49, 73 (1973) (BRENNAN, J., dissenting). With this understanding, I concur in the Court's judgment in this case.

SUPREME COURT OF THE UNITED STATES

No. 81-55

NEW YORK, PETITIONER *v.* PAUL IRA FERBER

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF NEW YORK

[July 2, 1982]

JUSTICE STEVENS, concurring in the judgment.

Two propositions seem perfectly clear to me. First, the specific conduct that gave rise to this criminal prosecution is not protected by the Federal Constitution; second, the state statute that respondent violated prohibits some conduct that is protected by the First Amendment. The critical question, then, is whether this respondent, to whom the statute may be applied without violating the Constitution, may challenge the statute on the ground that it conceivably may be applied unconstitutionally to others in situations not before the Court. I agree with the Court's answer to this question but not with its method of analyzing the issue.

Before addressing that issue, I shall explain why respondent's conviction does not violate the Constitution. The two films that respondent sold contained nothing more than lewd exhibition; there is no claim that the films included any material that had literary, artistic, scientific, or educational value.[1] Respondent was a willing participant in a commercial market that the State of New York has a legitimate interest in suppressing. The character of the State's interest in protecting children from sexual abuse justifies the imposition of criminal sanctions against those who profit, directly or indirectly, from the promotion of such films. In this respect my evaluation of this case is different from the opinion I have expressed concerning the imposition of criminal sanctions for the promotion of obscenity in other contexts.[2]

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[1] Respondent's counsel conceded at oral argument that a finding that the films are obscene would have been consistent with the *Miller* definition. Tr. of Oral Arg. 41.

A holding that respondent may be punished for selling these two films does not require us to conclude that other users of these very films, or that other motion pictures containing similar scenes, are beyond the pale of constitutional protection. Thus, the exhibition of these films before a legislative committee studying a proposed amendment to a state law, or before a group of research scientists studying human behavior, could not, in my opinion, be made a crime. Moreover, it is at least conceivable that a serious work of art, a documentary on behavioral problems, or a medical or psychiatric teaching device, might include a scene from one of these films and, when viewed as a whole in a proper setting, be entitled to constitutional protection. The question whether a specific act of communication is protected by the First Amendment always requires some consideration of both its content and its context.

The Court's holding that this respondent may not challenge New York's statute as overbroad follows its discussion of the contours of the category of nonobscene child pornography that New York may legitimately prohibit. Having defined that category in an abstract setting,[3] the Court makes the empirical judgment that the arguably impermissible application of the New York statute amounts to only a "tiny fraction of the materials within the statute's reach." *Ante*, at 25. Even assuming that the Court's empirical analysis is sound,[4] I believe a more conservative approach to the issue would adequately vindicate the State's interest in protecting its children and cause less harm to the federal interest in free expression.

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[2] See *Burch* v. *Louisiana*, 441 U. S. 130, 139 (STEVENS, J., concurring); *Pinkus* v. *United States*, 436 U. S. 293, 305 (STEVENS, J., concurring); *Ballew* v. *Georgia*, 435 U. S. 223, 245 (STEVENS, J., concurring); *Smith* v. *United States*, 431 U. S. 291, 311–321 (STEVENS, J., dissenting); *Marks* v. *United States*, 430 U. S. 188, 198 (STEVENS, J., concurring in part and dissenting in part); see also *Schad* v. *Borough of Mount Ephraim*, 452 U. S. 61, 84 (STEVENS, J., concurring in the judgment); *FCC* v. *Pacifica Foundation*, 438 U. S. 726, 750 (Opinion of STEVENS, J.).

[3] "The test for child pornography is separate from the obscenity standard enunciated in *Miller*, but may be compared to it for purpose of clarity.

A hypothetical example will illustrate my concern. Assume that the operator of a New York motion picture theater specializing in the exhibition of foreign feature films is offered a full-length movie containing one scene that is plainly lewd if viewed in isolation but that nevertheless is part of a serious work of art. If the child actor resided abroad, New York's interest in protecting its young from sexual exploitation would be far less compelling than in the case before us. The federal interest in free expression would, however, be just as strong as if an adult actor had been used. There are at least three different ways to deal with the statute's poten-

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The *Miller* formulation is adjusted in the following respects: A trier of fact need not find that the material appeals to the prurient interest of the average person; it is not required that sexual conduct portrayed be done so in a patently offensive manner; and the material at issue need not be considered as a whole." *Ante*, at 16.

[4] The Court's analysis is directed entirely at the permissibility of the statute's coverage of nonobscene material. Its empirical evidence, however, is drawn substantially from congressional committee reports that ultimately reached the conclusion that a prohibition against *obscene* child pornography—coupled with sufficiently stiff sanctions—is an adequate response to this social problem. The Senate Committee on the Judiciary concluded that "virtually all of the materials that are normally considered child pornography are obscene under the current standards," and that "[i]n comparison with this blatant pornography, non-obscene materials that depict children are very few and very inconsequential." S. Rep. No. 438, 95th Cong., 1st Sess., 13 (1977); see also H.R. Rep. No. 696, 95th Cong., 1st Sess., 7–8 (1977). The coverage of the federal statute is limited to obscene material. See 18 U. S. C. § 2252(a).

tial application to that sort of case.

First, at one extreme and as the Court appears to hold, the First Amendment inquiry might be limited to determining whether the offensive scene, viewed in isolation, is lewd. When the constitutional protection is narrowed in this drastic fashion, the Court is probably safe in concluding that only a tiny fraction of the materials covered by the New York statute is protected. And with respect to my hypothetical exhibitor of foreign films, he need have no uncertainty about the permissible application of the statute; for the one lewd scene would deprive the entire film of any constitutional protection.

Second, at the other extreme and as the New York Court of Appeals correctly perceived, the application of this Court's cases requiring that an obscenity determination be based on the artistic value of a production taken as a whole would afford the exhibitor constitutional protection and result in a holding that the statute is invalid because of its overbreadth. Under that approach, the rationale for invalidating the entire statute is premised on the concern that the exhibitor's understanding about its potential reach could cause him to engage in self censorship. This Court's approach today substitutes broad, unambiguous state-imposed censorship for the self censorship that an overbroad statute might produce.

Third, as an intermediate position, I would refuse to apply overbreadth analysis for reasons unrelated to any prediction concerning the relative number of protected communications that the statute may prohibit. Specifically, I would postpone decision of my hypothetical case until it actually arises. Advocates of a liberal use of overbreadth analysis could object to such postponement on the ground that it creates the risk that the exhibitor's uncertainty may produce self censorship. But that risk obviously interferes less with the interest in free expression than does an abstract, advance ruling that the film is simply unprotected whenever it contains a lewd scene, no matter how brief.

My reasons for avoiding overbreadth analysis in this case are more qualitative than quantitative. When we follow our traditional practice of adjudicating difficult and novel constitutional questions only in concrete factual situations, the adjudications tend to be crafted with greater wisdom. Hypothetical rulings are inherently treacherous and prone to lead us into unforeseen errors; they are qualitatively less reliable than the products of case-by-case adjudication.

Moreover, it is probably safe to assume that the category of speech that is covered by the New York statute generally is of a lower quality than most other types of communication. On a number of occasions, I have expressed the view that the First Amendment affords some forms of speech more protection from governmental regulation than other forms of speech.[5] Today the Court accepts this view, putting the category of speech described in the New York statute in its rightful place near the bottom of this hierarchy. *Ante*, at 14–15. Although I disagree with the Court's position that such speech is totally without First Amendment protection, I agree that generally marginal speech does not warrant the extraordinary protection afforded by the overbreadth doctrine.[6]

Because I have no difficulty with the statute's application in this case, I concur in the Court's judgment.

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[5] See, *e. g.*, *Schad* v. *Borough of Mount Ephraim*, *supra*, at 80, 83 (STEVENS, J., concurring in the judgment); *Consolidated Edison Co.* v. *Public Service Comm'n*, 447 U. S. 530, 544–548 (STEVENS, J., concurring in the judgment); *FCC* v. *Pacifica Foundation*, *supra*, at 744–748 (Opinion of STEVENS, J.); *Carey* v. *Population Services International*, 431 U. S. 678, 716–717 (STEVENS, J., concurring in part and concurring in the judgment); *Smith* v. *United States*, *supra*, at 317–319 (STEVENS, J., dissenting); *Young* v. *American Mini Theatres, Inc.*, 427 U. S. 50, 66–71 (Opinion of STEVENS, J.).

[6] See *FCC* v. *Pacifica Foundation*, *supra*, at 742–743 (Opinion of STEVENS, J.); *Young* v. *American Mini Theatres, Inc.*, *supra*, at 59–61; see also *Metromedia, Inc.* v. *City of San Diego*, 453 U. S. 490, 544–548 (STEVENS, J., dissenting in part); *Schad* v. *Borough of Mount Ephraim*, *supra*, at 85 (STEVENS, J., concurring in the judgment).

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(Slip Opinion)

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Lumber Co.*, 200 U. S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

UNITED MINE WORKERS OF AMERICA HEALTH & RETIREMENT FUNDS ET AL. *v.* ROBINSON ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 81-61. Argued January 13, 1981—Decided March 8, 1982

A 1974 collective-bargaining agreement between the United Mine Workers of America and the National Coal Operators Association increased health benefits, payable out of trust fund financed by contributions from the operators, for widows of coal miners who died prior to the effective date of the agreement and who were receiving pensions when they died, but did not increase such benefits for widows of miners who died prior to the effective date and were still working at the time of death even though they were eligible for pensions. Respondents, widows of miners who died in 1967 and 1971, respectively, and were eligible for pensions but were still working at the time of their deaths, brought a class action in Federal District Court against the trustees of the fund, alleging that the requirement that a miner be receiving a pension at the time of his death in order to make his widow eligible for the increased health benefits had no rational relationship to the purposes of the trust fund and therefore was illegal under § 302 of the Labor Management Relations Act. The District Court denied relief. The Court of Appeals reversed, holding that § 302(c)(5), which requires jointly administered pension trusts to be maintained "for the sole and exclusive benefit of employees . . . and their families and dependents," means that eligibility rules fixed by a collective-bargaining agreement must meet a reasonableness standard, and that in this case the trustees were unable to produce an acceptable explanation for the discrimination between widows of pensioners and widows of pension-eligible miners.

Held: Section 302(c)(5) does not authorize federal courts to review for reasonableness the provisions of a collective-bargaining agreement, such as the provisions in question, allocating health benefits among potential beneficiaries of an employee benefit trust fund. Pp. 7–14.

Ju 6. 8/b:

Syllabus

(a) Section 302(c)(5)'s language embodies no reasonableness requirement. Its plain meaning is simply that employer contributions to employee benefit trust funds must accrue to the benefit of employees and their families and dependents, to the exclusion of all others. Pp. 7–8.

(b) This reading is amply supported by the legislative history, which indicates that § 302(c)(5) was meant to protect employees from the risk that funds contributed by their employers for the benefit of the employees and their families might be diverted to other union purposes or even to union leaders' private benefit. P. 9.

(c) Such interpretation is also supported by § 302(c)(5)'s other requirements prescribing the conditions that must be satisfied to exempt employer contributions to pension funds from a criminal sanction. Pp. 9–10.

(d) Absent conflict with federal law, the trustees here breached no fiduciary duties in administering the trust fund in question in accordance with the 1974 collective-bargaining agreement. Pp. 10–12.

(e) When neither the collective-bargaining process nor its end product violates any command of Congress, a federal court has no authority to modify the substantive terms of a collective-bargaining contract. Pp. 12–13.

205 U. S. App. D. C. 330, 640 F. 2d 416, reversed

STEVENS, J., delivered the opinion for a unanimous Court.

NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D.C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

SUPREME COURT OF THE UNITED STATES

No. 81-61

UNITED MINE WORKERS OF AMERICA HEALTH AND RETIREMENT FUNDS, ET AL., PETITIONERS *v.* GRACIE ROBINSON AND JUANITA HAGER, ETC.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

[March 8, 1982]

JUSTICE STEVENS delivered the opinion of the Court.

This case involves a discrimination between two classes of widows of coal miners who died prior to December 6, 1974—those whose husbands were receiving pensions when they died and those whose husbands were still working although they were eligible for pensions. The 1974 collective bargaining agreement between the United Mine Workers of America and the National Coal Operators Association increased the health benefits for widows in the former class but made no increase for those in the latter class. The United States Court of Appeals for the District of Columbia Circuit held that this discrimination was arbitrary and therefore violated § 302(c)(5) of the Labor Management Relations Act of 1947 (LMRA).[1] 640 F. 2d 416 (CADC 1981). We granted certio-

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[1] That section provides in relevant part:

"The provisions of this section [forbidding transfers between employer and representatives of employees] shall not be applicable . . . (5) with respect to money or other thing of value paid to a trust fund established by such representative, for the sole and exclusive benefit of the employees of such employer, and their families and dependents (or of such employees, families, and dependents jointly with the employees of other employers making similar payments, and their families and dependents): *Provided*, That (A) such payments are held in trust for the purpose of paying, either rari to decide whether § 302(c)(5) authorizes federal courts to review for reasonableness the provisions of a collective bargaining agreement allocating health benefits among potential beneficiaries of an employee benefit trust fund.

I

A description of the origin of the discrimination may explain why the Court of Appeals considered it arbitrary. The 1950 collective bargaining agreement between the union and the operators established a fund to provide pension, health, and other benefits for certain miners and their dependents. That agreement defined the operators' obligation to contribute to the fund but delegated the authority to define the amount of benefits and the conditions of eligibility to the trustees of the fund.[2] In 1967 the trustees adopted two

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from principal or income or both, for the benefit of employees, their families and dependents, for medical or hospital care, pensions on retirement or death of employees, compensation for injuries or illness resulting from occupational activity or insurance to provide any of the foregoing, or unemployment benefits or life insurance, disability and sickness insurance, or accident insurance; (B) the detailed basis on which such payments are to be made is specified in a written agreement with the employer, and employees and employers are equally represented in the administration of such fund, together with such neutral persons as the representatives of the employers and the representatives of employees may agree upon . . . ; and (C) such payments as are intended to be used for the purpose of providing pensions or annuities for employees are made to a separate trust which provides that the funds held therein cannot be used for any purpose other than paying such pension or annuities. . . ." 29 U. S. C. § 186(c) (1976 ed., Supp. III).

[2] The National Bituminous Coal Wage Agreement of 1950, in creating the United Mine Workers of America Welfare and Retirement Fund of 1950, provided in part:

"Subject to the stated purposes of this Fund, the Trustees shall have full authority, within the terms and provisions of the 'Labor-Management Relations Act, 1947,' and other applicable law, with respect to questions of coverage and eligibility, priorities among classes of benefits, amounts of benefits, methods of providing or arranging for provisions for benefits, in-resolutions governing benefits for widows. Under the first, a widow of a retired miner who was receiving a pension at the time of his death was entitled to a death benefit of $2,000 payable over a two-year period, and a widow of a miner who was eligible for a pension but who was still working at the time of his death was entitled to a $5,000 benefit payable over a five-year period.[3] The second resolution authorized hospital and medical-care benefits for unremarried widows of deceased miners while they were receiving the widows' benefit authorized by the first resolution.[4] The effect of these two resolutions was to provide a greater health benefit for widows of working miners who were eligible for pensions than for widows of miners who were receiving pension benefits.

In 1974, because of their concerns about compliance with minimum funding standards of the recently enacted Employee Retirement Income Security Act (ERISA), 29 U. S. C. § 1001 *et seq.* (1976 ed. and Supp. III), and about the

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vestment of trust funds, and all other related matters." App. to Pet. for Cert. 78a.

[3] Resolution No. 68, adopted on January 19, 1967, established "a Widows and Survivors Benefit of five thousand dollars ($5,000.00) as a result of the death of miners who at the time of death were regularly employed in a classified job in the bituminous coal industry by coal operators signatory to the National Bituminous Coal Wage Agreement of 1950, as amended, other than those exempted from said Agreement, and two thousand dollars ($2,000.00) in the event of the death of miners who at the time of death were receiving Trust Fund pensions and not employed outside the coal industry. . . ." App. to Pet. for Cert. 82a. The $5,000 benefit was payable in 60 monthly installments and the $2,000 benefit was payable in 22 monthly installments. *Id.*, at 85a.

[4] Resolution No. 69, also adopted on January 19, 1967, provided in part: "The following persons shall be eligible for benefits herein provided for hospital and medical care . . . :

"5. Unremarried widows and unmarried dependent children under twenty-two (22) years of age of deceased miners described in Subparagraph B of this Paragraph I as long as they are the recipients of Widows and Survivors Benefits provided in Paragraph II of Resolution No. 68." App. to Pet. for Cert. 90a.

actuarial soundness of the 1950 fund, the union and the operators agreed to restructure the industry's benefit program. They agreed that the amount of benefits and the eligibility requirements, as well as the level of contributions, should be specified in their collective bargaining agreement. They also decided to replace the single 1950 fund with four separate funds, two of which provided pension benefits while two others, the "1950 Benefit Trust" and the "1974 Benefit Trust," provided health and death benefits. The 1950 Benefit Trust, which is at issue in this case, extended lifetime health coverage to certain widows of miners who died before December 6, 1974, the effective date of the 1974 collective bargaining agreement.[5]

During the 1974 negotiations, the union originally demanded that all unremarried widows who were entitled to health benefits for either two years or five years under the old plan be extended lifetime health coverage. Both the amount and the uncertainty of the cost of such coverage for these widows concerned the operators. Relatively early in the negotiations they nevertheless accepted the demand as it related to widows of miners who would die after the agreement became effective, but they objected to the requested increase for widows of already deceased miners. The operators estimated that the latter class consisted of between 25,000 and 50,000 widows, whereas the union's estimate was approximately 40,000. Of that total, about 10% were believed to be widows of miners who had been working at the time of their death, even though eligible for pensions, and thus already had been entitled to five years of health benefits. In the final stages of the 1974 negotiations, after a strike had begun, the operators made a package proposal to the union that excluded this smaller group of perhaps 4,000 or 5,000 widows from any increased health benefits. Besides making it possible to conclude an otherwise acceptable, complex collective bargaining agreement and to avoid a prolonged strike, the union received no separately identifiable *quid pro quo* for the rejection of this portion of its demands.

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[5] Article II, E(3) of the 1950 Benefit Trust provides that lifetime health benefits shall be provided to the survivors "of a miner who died . . . [p]rior to the effective date of this Plan . . . at a time when he was receiving a retirement or disability pension under the elegibility rules then in effect of the United Mine Workers of America Welfare and Retirement Fund of 1950." App. to Pet. for Cert. 114a. "By the trustee's interpretation, this clause applies to survivors of miners who died while collecting pensions and, as well, to survivors of those who, though not actually receiving retirement payments at death, had ceased work and applied for them. This construction, however, excludes widows and dependents of those miners who were eligible for pensions but who continued working and later died before applying for health-care benefits." 640 F. 2d, at 419 (footnotes omitted).

II

Respondents are widows of coal miners who died in 1967 and 1971, respectively. Their husbands were over age 55, had been employed in the industry for over 20 years, and had spent most of their careers in the employ of contributing employers. They were eligible for pensions but were still working at the time of their deaths. Under the 1950 plan, respondents were entitled to $5,000 death benefits and health benefits for five years. They received no additional benefits from the 1974 agreement. Had their husbands applied for the pensions for which they were eligible, they now would be entitled to lifetime health coverage.

On their own behalf and as representatives of a class of similarly situated widows and dependents of deceased coal miners, respondents brought this action against the trustees of the funds in the United States District Court for the District of Columbia.[6] They alleged that the requirement that a miner actually be receiving a pension for which he was eligible at the time of his death in order to make his survivors eligible for lifetime health benefits has no rational relationship with the purposes of the trust funds and therefore was illegal under § 302 of the LMRA. They prayed that the requirement be declared null and void and that the trustees be ordered to pay to them health benefits retrospectively and prospectively.

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[6] Federal district courts have jurisdiction to restrain violations of § 302. 29 U. S. C. § 186(e).

After certifying the respondents' class,[7] and after indicating that the plaintiffs had made a prima facie showing of arbitrariness, the court scheduled a hearing to give the petitioners an opportunity to prove that the discrimination against respondents was not arbitrary. At that hearing the District Court received documents prepared during the 1974 collective bargaining negotiations and heard the testimony of participants in those negotiations. Based on that evidence, the District Court found that "the question of whether or not to provide plaintiffs the benefits they now seek was the subject of explicit, informed and intense bargaining." App. to Pet. for Cert. 25a. The court rejected the argument that the eligibility requirement was arbitrary and capricious and held that "the trustees are bound to adhere to the terms of the agreement." *Ibid.* The court concluded:

> "Public policy dictates the limited role of courts in reviewing collectively bargained agreements. The familiar history of the anguished relations between the bargaining parties in this case only underscores the delicacy of the balance set in each agreement. Plaintiffs' relief,

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[7] "The class represents all surviving spouses and dependents of deceased miners who satisfied the age and service requirements for pension benefits at the time of death and who

"(1) were working in classified service in the coal industry at the time of death and had not applied for a pension, or

"(2) had applied for and were eligible to receive pension benefits but were not receiving such benefits at the time of death because of their return to classified service in the coal industry." 449 F. Supp. 941, 942 (DC 1978).

if indeed any is due, cannot come from the courts." *Ibid.*

A divided panel of the Court of Appeals reversed. Relying on the § 302(c)(5) requirement that jointly administered pension trusts be maintained "for the sole and exclusive benefit of the employees of [the contributing] employer, and their families and dependents," the court held that any rule denying benefits to employees on whose behalf significant contributions had been made must be explained to its satisfaction, particularly if benefits were authorized for others who had worked a lesser period of time for contributing employers. 640 F. 2d, at 421. In this case, the trustees were unable to produce an acceptable explanation for the discrimination between widows of pensioners and widows of pension-eligible miners. Specifically, the court held that it was "not enough that the particular eligibility standards were adopted simply because that enabled resolution of a collective bargaining dispute." *Id.*, at 424. Recognizing the legitimacy of a concern about actuarial soundness of pension trust funds, the court held that "financial integrity must be secured by methods dividing beneficiaries from nonbeneficiaries on lines reasonably calculated to further the fund's purposes." *Id.*, at 423–424.

Judge Robb, in dissent, agreed with the reasoning of the District Court and added the observation that the discrimination against widows of active miners was rational because those widows had received a larger death benefit than widows of pensioners, and because their needs may have been lesser than those of the families of pensioners since their husbands had continued to work after they were eligible for pensions.

III

The Court of Appeals held that the requirement in § 302(c)(5) that an employee benefit trust fund be maintained "for the sole and exclusive benefit of employees . . . and their families and dependents" means that eligibility rules fixed by a collective bargaining agreement must meet a reasonableness standard. The statutory language hardly embodies this reasonableness requirement. Its plain meaning is simply that employer contributions to employee benefit trust funds must accrue to the benefit of employees and their families and dependents, to the exclusion of all others. Indeed, this has been this Court's consistent interpretation of § 302(c)(5).

Just last Term, the Court reiterated that "the 'sole purpose' of § 302(c)(5) is to ensure that employee benefit trust funds 'are legitimate trust funds, used actually for the specified benefits to the employees of the employers who contribute to them . . . .'" *NLRB* v. *Amax Coal Co.*, —— U. S. ——, —— (quoting 93 Cong. Rec. 4678 (1947), reprinted in 2 Legislative History of the Labor Management Relations Act, 1947, 1305 (Leg. Hist. LMRA)). See *Arroyo* v. *United States*, 359 U. S. 419, 425–426.[8] Accord, *Walsh* v. *Schlecht*,

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[8] The Court stated:

"Those members of Congress who supported [§ 302] were concerned with corruption of collective bargaining through bribery of employee representatives by employers, with extortion by employee representatives, and with the possible abuse by union officers of the power which they might achieve if welfare funds were left to their sole control. Congressional attention was focussed particularly upon the latter problem because of the demands which had then recently been made by a large international union for the establishment of a welfare fund to be financed by employers' contributions and administered exclusively by union officials. See *United States* v. *Ryan*, 350 U. S. 299.

"Congress believed that if welfare funds were established which did not define with specificity the benefits payable thereunder, a substantial danger existed that such funds might be employed to perpetuate control of union officers, for political purposes, or even for personal gain. See 92 Cong. Rec. 4892–4894, 4899, 5181, 5345–5346; S. Rep. No. 105, 80th Cong., 1st Sess., at 52; 93 Cong. Rec. 4678, 4746–4747. To remove these dangers, specific standards were established to assure that welfare funds would be established only for purposes which Congress considered proper and expended only for the purposes for which they were established. See Cox, Some Aspects of the Labor Management Relations Act, 1947, 61

429 U. S. 401, 410–411; *Lewis* v. *Benedict Coal Corp.*, 361 U. S. 459, 474 (Frankfurter, J., dissenting). This reading is amply supported by the legislative history. See, *e. g.*, 93 Cong. Rec. 4877 (1947), 2 Leg. Hist. LMRA, at 1312;[9] *id.*, at 4882–4883, 2 Leg. Hist. LMRA, at 1321–1322.[10] The section was meant to protect employees from the risk that funds contributed by their employers for the benefit of the employees and their families might be diverted to other union purposes or even to the private benefit of faithless union leaders. Proponents of this section were concerned that pension funds administered entirely by union leadership might serve as "war chests" to support union programs or political factions, or might become vehicles through which "racketeers" accepted bribes or extorted money from employers.

Our interpretation of the purpose of the "sole and exclusive benefit" requirement is reinforced by the other requirements

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Harv. L. Rev. 274, 290." (footnotes omitted).

[9] Senator Taft, the primary author of the LMRA, stated:

"Certainly unless we impose some restrictions we shall find that the welfare fund will become merely a war chest for the particular union, and that the employees for whose benefit it is supposed to be established, for certain definite welfare purposes, will have no legal rights and will not receive the kind of benfits to which they are entitled after such deductions from their wages."

[10] Senator Ball, one of the sponsors of the floor amendment that became § 302, stated:

"All that is sought to be done by the amendment is to protect the rights of employees. After all, on any reasonable basis, payments by an employer to such a fund are in effect compensation to his employees. All that is sought to be done in the amendment is to see to it that the rights of employees in the fund are protected.

. . . . .

"In other words, when the union has complete control of this fund, when there is no detailed provision in the agreement creating the fund respecting the benefits which are to go to employees, the union and its leadership will always come first in the administration of the fund, and the benefits to which the employees supposedly are entitled will come second."

of § 302(c)(5). Section 302(c)(5) is an exception in a criminal statute that broadly prohibits employers from making direct or indirect payments to unions or union officials. Each of the specific conditions that must be satisfied to exempt employer contributions to pension funds from the criminal sanction is consistent with the nondiversion purpose. The fund must be established "for the sole and exclusive benefit" of employees and their families and dependents; contributions must be held in trust for that purpose and must be used exclusively for health, retirement, death, disability, or unemployment benefits; the basis for paying benefits must be specified in a written agreement; and the fund must be jointly administered by representatives of management and labor.[11] All the conditions in the section fortify the basic requirement that employer contributions be administered for the sole and exclusive benefit of employees. None of the conditions places any restriction on the allocation of the funds among the persons protected by § 302(c)(5).

The Court of Appeals did not attempt to ground its holding on the text or legislative history of § 302(c)(5). Rather, the court relied upon cases in which trustees of employee benefit trust funds, not the collective bargaining agreement, fixed the eligibility rules and benefit levels. The Court of Appeals has held in those cases "that the Trustees have 'full authority . . . with respect to questions of coverage and eligibility' and that the court's role is limited to ascertaining whether the Trustees' broad discretion has been abused by the adoption of arbitrary or capricious standards." *Pete* v. *United Mine Workers of American Welfare & Retirement Fund of 1950*, 517 F. 2d 1275, 1283 (CADC 1975) (en banc). Noting that "[t]he institutional arrangements creating this Fund and specifying the purposes to which it is to be devoted are cast expressly in fiduciary form," the court stated that "the Trustees, like all fiduciaries, are subject to judicial correction in a proper case upon a showing that they have acted arbitrarily or capriciously towards one of the persons to whom their trust obligations run." *Kosty* v. *Lewis*, 319 F. 2d 744, 747 (CADC 1963), cert. denied, 375 U. S. 964. Those cases, however, provide no support for the Court of Appeals' holding in this case.[12] The petitioner trustees were not given "full authority" to determine eligibility requirements and benefit levels, for these were fixed by the 1974 collective bargaining agreement. By the terms of the trust created by that agreement, the trustees are obligated to enforce these determinations unless modification is required to comply with applicable federal law.[13] The common law of trusts does not alter this obligation. See *NLRB* v. *Amax Coal Co.*, —— U. S. ——, ——; Restatement (Second) of Trusts, § 164. Cf. 29 U. S. C. § 1104(a)(1)(D) (1976 ed., Supp. III). Absent conflict with federal law, then, the trustees breached no fiduciary duties in administering the 1950 Benefit Trust in accordance with the terms established in the 1974 collective bargaining agreement.

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[11] See *NLRB* v. *Amax Coal Co.*, —— U. S. ——, ——; H. R. Rep. No. 510, 80th Cong., 1st Sess., 66–67 (1947), 2 Leg. Hist. LMRA, at 570–571.

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[12] In *NLRB* v. *Amax Coal Co.*, —— U. S. ——, ——, the Court held that in enacting § 302(c)(5) "Congress intended to impose on trustees traditional fiduciary duties." The Court did not decide, nor do we decide today, whether federal courts sitting as courts of equity are authorized to enforce those duties. It is, of course, clear that compliance with the specific standards of § 302(c)(5) in the administration of welfare funds is enforceable in federal district courts under § 302(e) of the LMRA. See *Arroyo* v. *United States*, 359 U. S. 419, 426–427.

[13] "The Trustees are authorized, upon approval by the Employers and the Union, to make such changes in the Plans and Trusts hereunder as they may deem to be necessary or appropriate.

"They are also authorized and directed, after adquate notice and consultation with the Employers and Union, to make such changes in the Plans and Trusts hereunder, including any retroactive modifications or amendments, which shall be necessary:

"(a) to conform the terms of each Plan and Trust to the requirements of ERISA, or any other applicable federal law, and the regulations issued thereunder;

. . . . .

"(d) to comply with all applicable court or government decisions or ruling." National Bituminous Coal Wage Agreement of 1974, art. XX, § (h)(5), App. to Pet. for Cert. 106a.

Section 302(c)(5) plainly does not impose the Court of Appeals' reasonableness requirement, and respondents do not offer any alternative federal law to sustain the court's holding. There is no general requirement that the complex schedule of the various employee benefits must withstand judicial review under an undefined standard of reasonableness. This is no less true when the potential beneficiaries subject to discriminatory treatment are not members of the bargaining unit; we previously have recognized that former members and their families may suffer from discrimination in collective bargaining agreements because the union need not "affirmatively . . . represent [them] or . . . take into account their interests in making bona fide economic decisions in behalf of those whom it does represent." *Allied Chemical & Alkali Workers* v. *Pittsburgh Plate Glass Co.*, 404 U. S. 157, 181 n. 20.[14] Moreover, because finite contributions must be allocated among potential beneficiaries, inevitably financial and actuarial considerations sometimes will provide the only justification for an eligibility condition that discriminates between different classes of potential applicants for benefits. As long as such conditions do not violate federal law or policy, they are entitled to the same respect as any other provision in a collective bargaining agreement.

The substantive terms of jointly administered employee benefit plans must comply with the detailed and comprehensive standards of the ERISA. The terms of any collective bargaining agreement must comply with federal laws that prohibit discrimination on grounds of race, color, religion, sex, or national origin;[15] that protect veterans;[16] that regulate certain industries;[17] and that preserve our competitive economy.[18] Obviously, an agreement must also be substantively consistent with the National Labor Relations Act, 29 U. S. C. § 151 *et seq.*[19] Moreover, in the collective bargaining process, the union must fairly represent the interests of all employees in the unit.[20] But when neither the collective bargaining process nor its end product violates any command of Congress, a federal court has no authority to modify the substantive terms of a collective bargaining contract.[21]

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[14] We also recognized that these persons are not without protection: "Under established contract principles, vested retirement rights may not be altered without the pensioner's consent. See generally Note, 70 Col. L. Rev. 909, 916–920 (1970). The retiree, moreover, would have a federal remedy under § 301 of the Labor Management Relations Act for breach of contract if his benefits were unilaterally changed. See *Smith* v. *Evening News Assn.*, 371 U. S. 195, 200–201 (1962); *Lewis* v. *Benedict Coal Corp.*, 361 U. S. 459, 470 (1960)." 404 U. S., at 181 n. 20.

The record in this case discloses no violation of § 302(c)(5) or of any other federal law. The judgment of the Court of Appeals is therefore reversed.

It is so ordered.

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[15] See, *e. g.*, *Franks* v. *Bowman Transportation Co.*, 424 U. S. 747 (Title VII of the Civil Rights Act of 1964); *Corning Glass Works* v. *Brennan*, 417 U. S. 188 (Equal Pay Act).

[16] See, *e. g.*, *Fishgold* v. *Sullivan Dry Dock & Repair Corp.*, 328 U. S. 275, 285.

[17] See, *e. g.*, *Norfolk & Western R. Co.* v. *Nemitz*, 404 U. S. 37.

[18] See, *e. g.*, *United Mine Workers* v. *Pennington*, 381 U. S. 657.

[19] See, *e. g.*, *NLRB* v. *Magnavox Co.*, 415 U. S. 322; *Radio Officers' Union* v. *NLRB*, 347 U. S. 17.

[20] See, *e. g.*, *Vaca* v. *Sipes*, 386 U. S. 171, 177; *Syres* v. *Oil Workers International Union*, 350 U. S. 892; *Ford Motor Co.* v. *Huffman*, 345 U. S. 330; *Steele* v. *Louisville & N.R. Co.*, 323 U. S. 192. See also *Brotherhood of Railroad Trainmen* v. *Howard*, 343 U. S. 768.

[21] See, *e. g.*, *Carbon Fuel Co.* v. *United Mine Workers*, 444 U. S. 212, 218–219; *H.K. Porter Co.* v. *NLRB*, 397 U. S. 99, 105–108; *NLRB* v. *Insurance Agents*, 361 U. S. 477, 488; *Teamsters* v. *Oliver*, 358 U. S. 283, 295–296; *NLRB* v. *American National Insurance Co.*, 343 U. S. 395, 404.

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SUPREME COURT OF THE UNITED STATES

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No. 81-89

WALTER ZANT, WARDEN, PETITIONER, *v.* ALPHA OTIS O'DANIEL STEPHENS

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

[May 3, 1982]

PER CURIAM.

The respondent was convicted of murder in a Georgia Superior Court. His sentencing jury found the following statutory aggravating circumstances:[1]

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[1] The trial judge instructed the sentencing jury as follows:

"Gentlemen of the Jury, the defendant in this case has been found guilty at your hands of the offense of Murder, and it is your duty to make certain determinations with respect to the penalty to be imposed as punishment for that offense. Now in arriving at your determinations in this regard you are authorized to consider all of the evidence received in court throughout the trial before you. You are further authorized to consider all facts and circumstances presented in extinuation [*sic*], mitigation and aggravation of punishment as well as such arguments as have been presented for the State and for the Defense. Under the law of this State every person guilty of Murder shall be punished by death or by imprisonment for life, the sentence to be fixed by the jury trying the case. In all cases of Murder for which the death penalty may be authorized the jury shall consider any mitigating circumstances or aggravating circumstances authorized by law. You may consider any of the following statutory aggravating circumstances which you find are supported by the evidence. One, the offense of Murder was committed by a person with a prior record of conviction for a Capital felony, or the offense of Murder was committed by a person who has a substantial history of serious assaultive criminal convictions. Two, the offense of Murder was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind or an aggravated battery to the victim. Three, the offense of Murder was committed by a person

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> "(1) that the offense of murder was committed by a person with a prior record of conviction of a capital felony, Code Ann. §27–2534.1(b)(1); (2) that the murder was committed by a person who has a substantial history of serious assaultive criminal convictions, Code Ann. §27–2534.1(b)(1), supra; and, (3) that the offense of murder was committed by a person who had escaped from the lawful custody of a peace officer or a place of lawful confinement, Code Ann. §27–2534.1(b)(9)." *Stephens* v. *Hopper*, 241 Ga. 596, 597–598, 247 S.E. 2d 92, 94, cert. denied, 439 U. S. 991 (1978).

The jury imposed the death penalty. On direct appeal, the

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who has escaped from the lawful custody of a peace officer or place of lawful confinement. These possible statutory circumstances are stated in writing and will be out with you during your deliberations on the sentencing phase of this case. They are in writing here, and I shall send this out with you. If the jury verdict on sentencing fixes punishment at death by electrocution you shall designate in writing, signed by the foreman, the aggravating circumstances or circumstance which you found to have been proven beyond a reasonable doubt. Unless one or more of these statutory aggravating circumstances are proven beyond a reasonable doubt you will not be authorized to fix punishment at death. If you fix punishment at death by electrocution you would recite in the exact words which I have given you the one or more circumstances you found to be proven beyond a reasonable doubt. You would so state in your verdict, and after reciting this you would state, We fix punishment at death. On the other hand, if you recommend mercy for the defendant this will result in imprisonment for life of the defendant. In such case it would not be necessary for you to recite any mitigating or aggravating circumstances as you may find, and you would simply state in your verdict, We fix punishment at life in prison. Now, whatever your verdict may be with respect to the responsibility you have regarding sentencing please write these out, Mr. Foreman, immediately below the previous verdict you have rendered. Be sure that it is dated and that it bears your signature as foreman. Once again when you have arrived at your verdict on the sentencing phase of the case let us know. We will then receive the verdict from you and have it published here in open court. Please retire now and consider the sentence in this case." App. 18–19.

Georgia Supreme Court affirmed. *Stephens* v. *State*, 237 Ga. 259, 227 S.E. 2d 261, cert. denied, 429 U. S. 986 (1976). On the authority of *Arnold* v. *State*, 236 Ga. 534, 224 S.E. 2d 386 (1976), it set aside the second statutory aggravating circumstance found by the jury. It upheld the death sentence, however, on the ground that in *Arnold* "that was the sole aggravating circumstance found by the jury," whereas in the case under review "the evidence supports the jury's findings of the other statutory aggravating circumstances, and consequently the sentence is not impaired." 237 Ga., at 261–262, 227 S.E. 2d, at 263.

After exhausting his state post-conviction remedies, *Stephens* v. *Hopper*, 241 Ga. 596, 247 S.E. 2d 92, cert. denied, 439 U. S. 991 (1978), the respondent applied for a writ of habeas corpus in federal district court. Relief was denied by that court, but the United States Court of Appeals for the Fifth Circuit "reverse[d] the district court's denial of habeas corpus relief insofar as it le[ft] standing the [respondent's] death sentence, and . . . remanded for further proceedings." 631 F. 2d 397, 407 (CA5 1980), modified, 648 F. 2d 446 (1981). We granted the State's petition for certiorari. —— U. S. ——.

In *Gregg* v. *Georgia*, 428 U. S. 153 (1976), we upheld the Georgia death penalty statute because the standards and procedures set forth therein promised to alleviate to a significant degree the concern of *Furman* v. *Georgia*, 408 U. S. 238 (1972), that the death penalty not be imposed capriciously or in a freakish manner. We recognized that the constitutionality of Georgia death sentences ultimately would depend on the Georgia Supreme Court construing the statute and reviewing capital sentences consistently with this concern. See 428 U. S., at 198, 201–206 (Opinion of Stewart, POWELL, and STEVENS, JJ.); *id.*, at 211–212, 222–224 (WHITE, J., concurring in judgment). Our review of the statute did not lead us to examine all of its nuances. It was only after the state law relating to capital sentencing was clarified in concrete cases that we confronted and addressed more specific constitutional challenges in *Coker* v. *Georgia*, 433 U. S. 584 (1977), *Presnell* v. *Georgia*, 439 U. S. 14 (1978), *Green* v. *Georgia*, 442 U. S. 95 (1979), and *Godfrey* v. *Georgia*, 446 U. S. 420 (1980).

Today, we are asked to decide whether a reviewing court constitutionally may sustain a death sentence as long as at least one of a plurality of statutory aggravating circumstances found by the jury is valid and supported by the evidence. The Georgia Supreme Court consistently has asserted that authority.[2] Its construction of state law is clear: "Where two or more statutory aggravating circumstances are found by the jury, the failure of one circumstance does not so taint the proceedings as to invalidate the other aggravating circumstance found and the sentence of death based thereon." *Gates* v. *State*, 244 Ga. 587, 599, 261 S.E. 2d 349, 358 (1979), cert. denied, 445 U. S. 938 (1980).

Despite the clarity of the state rule we are asked to review, there is considerable uncertainty about the state-law premises of that rule.[3] The Georgia Supreme Court has never explained the rationale for its position. It may be that implicit in the rule is a determination that multiple findings of statutory aggravating circumstances are superfluous, or a determination that the reviewing court may assume the role of the jury when the sentencing jury recommended the death penalty under legally erroneous instructions. In this Court, the Georgia Attorney General offered as his understanding the following construction of state law: The jury must first find whether one or more statutory aggravating circumstances have been established beyond a reasonable doubt. The existence of one or more aggravating circumstances is a threshold finding that authorizes the jury to consider imposing the death penalty; it serves as a bridge that takes the jury from the general class of all murders to the narrower class of offenses the state legislature has determined warrant

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[2] See *Stevens* v. *State*, 247 Ga. 698, 709, 278 S.E. 2d 398, 407 (1981); *Green* v. *State*, 246 Ga. 598, 606, 272 S.E. 2d 475, 485 (1980), cert. denied, 450 U. S. 936 (1981); *Hamilton* v. *State*, 246 Ga. 264, 264, n. 1, 271 S.E. 2d 173, 174, n. 1 (1980), cert. denied, 449 U. S. 1103 (1981); *Brooks* v. *State*, 246 Ga. 262, 263, 271 S.E. 2d 172, 172 (1980), cert. denied, 451 U. S. 921 (1981); *Collins* v. *State*, 246 Ga. 261, 262, 271 S.E. 2d 352, 354 (1980), cert. denied, 449 U. S. 1103 (1981); *Dampier* v. *State*, 245 Ga. 882, 883, n. 1, 268 S.E. 2d 349, 350, n. 1, cert. denied, 449 U. S. 938 (1980); *Burger* v. *State*, 245 Ga. 458, 461–462, 265 S.E. 2d 796, 799–800, cert. denied, 446 U. S. 988 (1980); *Gates* v. *State*, 244 Ga. 587, 599, 261 S.E. 2d 349, 358 (1979), cert. denied, 445 U. S. 938 (1980); *Stephens* v. *State*, 237 Ga. 259, 261–262, 227 S.E. 2d 261, 263 (1976), cert. denied, 429 U. S. 986 (1977).

[3] Last Term, Members of this Court expressed different assumptions about the meaning—and the constitutionality—of the Georgia Supreme Court's position. In *Drake* v. *Zant*, 449 U. S. 999 (1980), the Court declined to grant certiorari and vacate the judgments in two Georgia cases in which the death sentences—premised in part on the (b)(7) aggravating cir-

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cumstance—were imposed prior to our decision in *Godfrey* v. *Georgia*, 446 U. S. 420 (1980). JUSTICE STEVENS, concurring in the disposition, expressed the opinion that the Georgia Supreme Court's position was so clear that there was no need to remand the cases for reconsideration in light of *Godfrey*. *Id.*, at 1000. Dissenting from the denial of certiorari, Justice Stewart stated that if one aggravating circumstance found by the jury "could not constitutionally justify the death sentence, Georgia law would prohibit a further finding that the error was harmless simply because of the existence of the other aggravating circumstance." *Id.*, at 1001. He believed that the Georgia Supreme Court's position on the issue was inconsistent with the Georgia capital punishment scheme because "only the trial judge or jury can know and determine what to do when upon appellate review it has been concluded that a particular aggravating circumstance should not have been considered in sentencing the defendant to death." *Ibid.* JUSTICE WHITE, also dissenting, would have remanded for reconsideration in light of *Godfrey*, a disposition that "would allow the Georgia Supreme Court in the first instance to determine whether the death penalty should be sustained without regard to the validity of the *Godfrey* circumstance." *Id.*, at 1002. He did "not understand the Georgia cases . . . to hold either that the Georgia Supreme Court is without power to set aside a death penalty if it sustains only one of the aggravating circumstances found by the jury or that, although the court has that power, it invariably will not disturb the death penalty in such situations." *Ibid.*

the death penalty. After making the finding that the death penalty is a possible punishment, the jury then makes a separate finding whether the death penalty should be imposed. It bases this finding "not upon the statutory aggravating circumstances but upon all the evidence before the jury in aggravation and mitigation of punishment which ha[s] been introduced at both phases of the trial." Brief for Petitioner 13.

In view of the foregoing uncertainty, it would be premature to decide whether such determinations, or any of the others we might conceive as a basis for the Georgia Supreme Court's position, might undermine the confidence we expressed in *Gregg* v. *Georgia*, *supra*, that the Georgia capital-sentencing system, as we understood it then, would avoid the arbitrary and capricious imposition of the death penalty and would otherwise pass constitutional muster. Suffice it to say that the state-law premises of the Georgia Supreme Court's conclusion of state law are relevant to the constitutional issue at hand.

The Georgia Supreme Court under certain circumstances will decide questions of state law upon certification from this Court. See Ga. Code Ann. § 24-4536.[4] We invoke that statute to certify the following question: What are the premises of state law that support the conclusion that the death sentence in this case is not impaired by the invalidity of one of the statutory aggravating circumstances found by the jury?

The Clerk of this Court is directed to transmit this certificate, signed by THE CHIEF JUSTICE and under the official

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[4] "When it shall appear to the Supreme Court of the United States . . . that there are involved in any proceeding before it questions or propositions of the laws of this State which are determinative of said cause and there are no clear controlling precedents in the appellate court decisions of this State, such Federal appellate court may certify such questions or propositions of the laws of Georgia to this court for instructions concerning such questions or propositions." Ga. Code Ann. § 24-4536(a).

seal of the Court, as well as the briefs and record filed with the Court, to the Supreme Court of Georgia, and simultaneously to transmit copies of the certificate to the attorneys for the respective parties.

[illegible] the evidence [illegible] of the law." Ibid. [illegible]

In view of the foregoing [illegible], it would be [illegible] whether such [illegible] which are the [illegible] that the [illegible] as to [illegible] would [illegible] and [illegible] the [illegible] of the [illegible] that the [illegible] provisions of the Georgia [illegible] of [illegible] are not [illegible] to the [illegible] of [illegible]

The Georgia Supreme Court, under [illegible] will decide questions of state law upon certification from [illegible] Court. See Ga. Code Ann. [illegible] to certify the following question: [illegible] principles of state law that support the conclusion [illegible] death sentence in this case is not [illegible] by the [illegible] of the [illegible]

The Clerk of this Court is directed to [illegible] with [illegible] the [illegible] and under the [illegible]

[illegible] When it shall appear to the Supreme Court of the [illegible] that there are involved in any proceeding before it questions or [illegible] laws of this State which are determinative of said cause [illegible] there are no clear controlling precedents in the decisions [illegible] this State, such Federal appellate court may certify such questions [illegible] of the laws of Georgia to this court for instructions concerning [illegible] questions or propositions." Ga. Code Ann. [illegible]

SUPREME COURT OF THE UNITED STATES

No. 81-89

WALTER ZANT, WARDEN, PETITIONER, *v.* ALPHA OTIS O'DANIEL STEPHENS

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

[May 3, 1982]

JUSTICE MARSHALL, with whom JUSTICE BRENNAN joins, dissenting.

Six years ago in *Gregg* v. *Georgia*, 428 U. S. 153, 193 (1976) (joint opinion of Stewart, POWELL, and STEVENS, JJ.), this Court declared:

> "Juries are invariably given careful instructions on the law and how to apply it before they are authorized to decide the merits of a lawsuit. It would be virtually unthinkable to follow any other course in a legal system that has traditionally operated by following prior precedents and fixed rules of law. . . . When erroneous instructions are given, retrial is often required. It is quite simply a hallmark of our legal system that juries be carefully and adequately guided in their deliberations." (citations and footnote omitted).

In today's decision, a majority of this Court intimates that a *post hoc* construction of a death penalty statute by the State's highest court may remedy the fact that a jury was improperly instructed with respect to the very factors that save the Georgia statute from unconstitutionality. See *Gregg* v. *Georgia, supra.* Because I cannot see how the Georgia Supreme Court's response to this Court's certification could constitutionally justify the imposition of the death penalty in this case, I must dissent.

I

I adhere to my view that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments. *Gregg* v. *Georgia*, *supra*, at 231. Even if I believed that the death penalty could constitutionally be imposed under certain circumstances, however, I believe that respondent Stephens' sentence must be vacated and his case remanded to the Georgia state courts for resentencing.

II

In my opinion, remanding this case for resentencing is compelled by this Court's decisions upholding the constitutionality of the Georgia death penalty statute, and by well recognized principles of appellate review. Therefore, whether or not the Georgia Supreme Court's construction of the statute in response to this Court's certification might avoid the constitutional infirmity inherent in respondent's sentence in some future case, it can do nothing to alter the fact that respondent's death sentence may have been based in part on consideration of an unconstitutional aggravating circumstance.

Under Georgia law, certification is appropriate "[w]hen it shall appear to the Supreme Court of the United States . . . that there are involved in any proceeding before it questions or propositions of the laws of this State *which are determinative of said cause* and there are no clear controlling precedents in the appellate court decisions of this State." Ga. Code § 24-4536(a) (emphasis added). The majority attempts to bring this case within the ambit of this certification procedure by indicating that "[i]t may be that . . . multiple findings of statutory aggravating circumstances are superflous, or . . . the reviewing court may assume the role of the jury when the sentencing jury recommended the death penalty under legally erroneous instructions." *Ante*, at 5. The majority then requests the Georgia Supreme Court to clarify "the premises of state law that support the conclusion that the death sentence in this case is not impaired by the invalidity of one of the statutory aggravating circumstances found by the jury." *Ante*, at 6.

I wholeheartedly agree that we do not know the answers to these questions. The majority recognizes that we do not possess this information because "[t]he Georgia Supreme Court has never explained the rationale for its position" that a death sentence may be reaffirmed when one of the aggravating circumstances relied on by the jury is declared invalid. *Ante*, at 4–5. I submit, however, that we are not alone in our ignorance. There is absolutely no indication that the jury sentencing respondent to death or the judge who instructed that jury was any more aware of the answers to these questions than we are today. Indeed, by certifying these questions to the Georgia Supreme Court, the majority concedes that it was impossible for *anyone* to know the answers to these questions at the time respondent was sentenced to death, because "there are no controlling precedents" in Georgia on these issues. Given this Court's prior treatment of cases in which a defendant received a sentence, particularly a death sentence, on the basis of erroneous jury instructions, I do not understand how the Georgia Supreme Court's answer to the certified question could possibly be "determinative" of this case.

In *Furman* v. *Georgia*, 408 U. S. 238 (1972) this Court struck down death penalties imposed pursuant to a Georgia statute. Shortly thereafter, the Georgia legislature enacted the current death penalty statute. This statute provides for a separate sentencing proceeding after the defendant has been found guilty of a capital offense. During the sentencing phase, the trial judge shall instruct the jury[1] to consider "any of the [10] statutory aggravating circumstances which may be supported by the evidence." Ga. Code §27-2534.1(b). The aggravating circumstances found by the judge to be warranted by the evidence are submitted to the jury in writing to be used during its deliberations. *Id.*, §27-2534.1(c). If the jury recommends a death sentence, it "shall designate in writing . . . the aggravating circumstance or circumstances which it found beyond a reasonable doubt." *Id.*, §27-2534.1(c). Even if it finds that one or more aggravating circumstances has been established beyond a reasonable doubt, the jury is not required to impose the death penalty. See *Bowen* v. *State*, 241 Ga. 492, 246 S.E. 2d 322 (1978). The jury's verdict to impose the death penalty must be unanimous. *Miller* v. *State*, 237 Ga. 557, 229 S.E. 2d 376 (1976). The trial judge is bound by the jury's recommendation of sentence, whether that recommendation be life or death. Ga. Code §§26-3102, 27-2514.

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[1] In bench trials, the judge must consider these factors.

In *Gregg* v. *Georgia*, 428 U. S. 153 (1976), this Court held that this statutory scheme satisfied the constitutional guaranty against cruel and unusual punishment. In reaching this conclusion, the two principal joint opinions relied heavily on the fact that the aggravating circumstances served to guide the jury's discretion. Announcing the judgment of the Court, Justice Stewart emphasized that because "the members of a jury will have had little, if any, previous experience in sentencing," *id.*, at 192, they should be given specific standards to guide their sentencing deliberations, such as those provided in the Model Penal Code, which catalogs "'the main circumstances of aggravation and of mitigation that should be weighed *and weighed against each other*'" by the jury. *Id.*, at 193 (quoting ALI, Model Penal Code §201.6, Comment 3, p. 71 (Tent. Draft No. 9, 1959)) (emphasis in original). Justice Stewart found that the new Georgia statute satisfied this requirement because, through the statutory aggravating circumstances, "[t]he new Georgia sentencing procedures . . . *focus the jury's attention* on the particularized nature of the crime and the particularized characteristics of the individual defendant. *Gregg* v. *Georgia*, *supra*, 428 U. S., at 206 (Opinion of Stewart, POWELL, and STEVENS, JJ.) (emphasis added). JUSTICE WHITE, joined by THE CHIEF JUSTICE and JUSTICE REHNQUIST, concurring in the judgment placed an even stronger emphasis on the role of the statutory aggravating circumstances:

> "The Georgia Legislature has plainly made an effort to guide the jury in the exercise of its discretion, while at the same time permitting the jury to dispense mercy on the basis of factors too intangible to write into a statute. . . . As the types of murders for which the death penalty may be imposed become more narrowly defined and are limited to those which are particularly serious or for which the death penalty is peculiarly appropriate *as they are in Georgia by reason of the aggravating-circumstance requirement*, it becomes reasonable to expect that juries—even given discretion *not* to impose the death penalty—will impose the death penalty in a substantial portion of the cases so defined." *Id.*, at 222 (WHITE, J., concurring in the judgment) (emphasis added).

In *Godfrey* v. *Georgia*, 446 U. S. 420, 428 (1980) (plurality opinion of Stewart, BLACKMUN, POWELL, and STEVENS, JJ.), this Court reaffirmed the role of aggravating circumstances in protecting against the arbitrary impostition of the death penalty. The *Godfrey* Court addressed the constitutionality of a death sentence imposed in reliance on aggravating circumstance § (b)(7), which allows a jury to impose the death sentence if it finds that the murder "was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim." Ga. Code § 27-2534.1(b)(7).

The plurality opinion found: "There is nothing in these few words standing alone, that implies any inherent restraint on the arbitrary and capricious infliction of the death sentence. A person of ordinary sensibility could fairly characterize almost every murder as 'outrageously or wantonly vile, horrible and inhuman.'" 446 U. S., at 428–429. Section (b)(7), if construed broadly enough to encompass every murder, would be unconstitutional because it provides "no principled way to distinguish this case, in which the death penalty was imposed, from the many cases in which it was not." *Id.*, at 433. The plurality found it significant that this interpretation of § (b)(7) "may . . . have been one to which the members of the jury in this case subscribed," and that, if the jury did hold this view "their preconceptions were not dispelled by the trial judge's sentencing instructions." *Id.*, at 429. Therefore, the jury was not given appropriate guidance, and the death sentence could not constitutionally be imposed.

In my view, this reasoning requires that respondent's death sentence be vacated and that this case be remanded so he can be resentenced by a properly instructed jury. It is conceded that the jury in this case was instructed on an aggravating circumstance that the Georgia Supreme Court has since declared unconstitutional. If this were the only aggravating circumstance found by the jury, it is also undisputed that the State would be unable to impose the death sentence, see *Arnold* v. *State*, 236 Ga. 534, 224 S.E. 2d 386 (1976), even if the Georgia Supreme Court determined that the evidence supported a finding of other statutory aggravating circumstances. Cf. *Presnell* v. *Georgia*, 439 U. S. 14, 16 (1978). Petitioner argues, however, because the jury found two other statutory aggravating circumstances that the Georgia Supreme Court found to be supported by the evidence, that court could reaffirm the death sentence. This argument flies in the face of the reasoning of the *Godfrey* plurality which found it crucial that the *jury's* decision to impose the death sentence be guided by clear and appropriate instructions.

Moreover, this argument is patently contrary to the settled principle that "if the jury has been instructed to consider several grounds for conviction, one of which proves to be unconstitutional, and the reviewing court is thereafter unable to determine from the record whether the jury relied on the unconstitutional ground, the verdict must be set aside." *Stephens* v. *Zant*, 631 F. 2d 397, 406 (CA5 1980); see *Stromberg* v. *California*, 283 U. S. 359 (1931). Since 1931, this Court has consistently declined to speculate about whether a particular jury would have reached the same conclusion in the absence of an unconstitutional instruction. See, *e. g.*, *id.*, at 367–368 (1931). Accord *Bachellar* v. *Maryland*, 397 U. S. 564, 570–571 (1970); *Street* v. *New York*, 394 U. S. 576, 585–588 (1969); *Yates* v. *United States*, 354 U. S. 298, 311–312 (1957). In light of this Court's consistent recognition that "the penalty of death is qualitatively different from a sentence of imprisonment," *Woodson* v. *North Carolina*, 428 U. S. 303, 305 (1980) (opinion of Stewart, POWELL, and STEVENS, JJ.); see, *e. g.*, *Eddings* v. *Oklahoma*, —— U. S. ——, —— (1982) (O'CONNOR, J., concurring), there is certainly no reason to engage in such speculation here. Yet, the jury is not *required* to recommend death even if it finds that one or more aggravating circumstances has been established beyond a reasonable doubt. Therefore, to adopt the bald pronouncement that "[w]here two or more statutory aggravating circumstances are found by the jury, the failure of one circumstance does not so taint the proceedings as to invalidate the other aggravating circumstance found and the sentence of death thereon," *Gates* v. *State*, 244 Ga. 587, 599, 261 S.E. 2d 349, 358 (1979), we would have to speculate that the jury's decision to impose the death penalty was not influenced by the presence of the unconstitutional aggravating circumstance.[2]

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[2] To date, the majority of state courts that have confronted this issue have declined to speculate whether the jury would still have returned a death sentence in the absence of the subsequently invalidated aggravating circumstance. See, *e. g.*, *Williams* v. *State*, 621 S.W. 2d 686, 687–688 (Ark. 1981); *State* v. *Irwin*, 282 S.E. 2d 439, 448–449 (N.C. 1981); *State* v.

Recognizing that settled law normally requires that sentences arguably imposed on the basis of unconstitutional instructions cannot stand, petitioner and several states in an *amicus curiae* brief[3] attempt to distinguish the *Stromberg* line of cases by arguing that, as a matter of statutory construction, a jury's finding that one of the ten aggravating circumstances has been established beyond a reasonable doubt is irrelevant to its ultimate conclusion that the death penalty should be imposed. Specifically, petitioner argues that the term "aggravating circumstance" actually has *two* entirely different meanings, with each meaning representing a separate task that a capital sentencing jury must perform. First, the jury must determine whether any of the ten statutory "aggravating circumstances" has been established beyond a reasonable doubt. This, petitioner argues, is a threshold determination that only allows the jury to *consider* the death penalty, but has no impact on whether that penalty should be imposed. After reaching this threshold determination, the jury may consider any "evidence in aggravation" or mitigation in reaching its conclusion as to whether the dealth penalty *should* be imposed. According to petitioner, the jury perfoms this second task free of any influence from the very "legislative guidelines" that, by "focus[ing] the jury's attention on the particularized nature of the crime and the particularized characteristics of the individual defendant," prevent the death penalty from being wantonly and freakishly imposed. *Gregg* v. *Georgia*, *supra*, 428 U. S., at 206-207 (plurality opinion of Stewart, POWELL, and STEVENS, JJ.).

Moore, 614 S.W. 2d 348, 351-352 (Tenn. 1981); *Hopkins* v. *State*, 632 P. 2d 79, 171-172 (Wy. 1981). See also *Cook* v. *State*, 369 So. 2d 1251, 1255-1257 (Ala. App. 1979).

[3] The States of Alabama, California, Florida, Missouri, North Carolina, South Carolina, and Utah submitted an amicus brief on behalf of petitioner. It is interesting to note that the appellate courts of Alabama and North Carolina have already implicitly rejected the construction now urged by these States as *amicus*. See n. 2, *supra*.

Putting to one side both the plausibility and the constitutionality of petitioner's construction of the Georgia death penalty statute,[4] it is patently obvious that this *ex post facto* attempt to avoid the clear mandate of *Stromberg* cannot possibly remedy the constitutional infirmity of respondent's sentence. This conclusion is compelled by this Court's decision in *Sandstrom* v. *Montana*, 442 U. S. 510 (1979). In *Sandstrom*, a defendant was convicted of "deliberate homicide," which, under Montana law, required the State to prove that he "purposefully or knowingly" caused the death of the victim. *Id.*, at 512. At the close of all the evidence, the judge instructed the jury that "[t]he law presumes that a person intends the ordinary consequences of his voluntary acts." *Id.*, at 513. The defendant objected to this instruction on the ground that it unconstitutionally shifted the burden of proof on the issue of intent. On direct appeal, the Montana Supreme Court conceded that shifting the burden of proof in a criminal case was unconstitutional. It nevertheless upheld the challenged instruction on the ground that under its interpretation, the instruction only shifted the burden of production rather than the burden of persuasion. *Id.*, at 513–514. In the proceedings before this Court, the State argued that the Montana Supreme Court's interpretation of the effect of the presumption was conclusive on this Court. *Id.*, at 516.

This Court unanimously[5] rejected the State's attempt to avoid the constitutional issue by the use of a *post hoc* narrowing construction by the State's highest court. While acknowledging that "[t]he Supreme Copurt of Montana is . . . the final authority on the legal weight to be given a presumption under Montana law, . . . *it is not the final authority on the interpretation which a jury could have given the [chal-*

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[4] In my view, if the Georgia Supreme Court adopted this interpretation of their death penalty statute, it would raise serious questions as to the constitutionality of this statute under *Gregg*.

[5] JUSTICE REHNQUIST joined by THE CHIEF JUSTICE filed a separate opinion concurring in both the judgment and the opinion of the Court.

lenged] instruction." *Id.*, at 516–517 (emphasis added). Instead, this Court defined the relevant question as whether "a reasonable juror could have been misled by the instruction." *Id.*, at 517. Even assuming the constitutionality of the Montana Supreme Court's interpretation of the presumption, an interpretation that this Court conceded might have been in the minds of "some jurors," the fact that "a reasonable juror could have given the presumption conclusive or persuasion-shifting effect means that we cannot discount the possibility that *Sandstrom's jurors* actually did proceed upon one or the other of these latter interpretations." *Id.*, at 519 (emphasis added). "Because David Sandstom's jury may have interpreted the judge's instruction as constituting either a burden-shifting presumption . . ., or a conclusive presumption," *id.*, at 524, this Court held the instruction unconstitutional and remanded the case to the state courts for proceedings not inconsistent with the opinion.[6]

In my view, the case presently before the Court presents even a stronger case for rejecting the relevance of an *ex post facto* saving construction. By certifying this question to the Georgia Supreme Court, the majority concedes that this construction has never been explicitly adopted by the Georgia courts. It must also be acknowledged that petitioner's interpretation of the jury's role under the Georgia law is not the only, or even the most plausible, construction of the death penalty statute. A "reasonable juror" could fairly conclude that he or she was required to place special emphasis on the existance of statutory aggravating circumstances, and weigh them against each other and against any mitigating circumstances, when deciding whether or not to impose the death penalty. Cf. *Godfrey* v. *Georgia*, *supra*, at 428–429. Certainly several members of this Court have operated under this assumption. See *Gregg* v. *Georgia*, *supra*, 428 U. S., at 197–198, 221–222; *Godfrey* v. *Georgia*, *supra*, at 436–437 (MARSHALL, J., concurring in the judgment); *Drake* v. *Zant*, 449 U. S. 999, 1001 (1980) (Stewart, J., dissenting from the denial of certiorari).

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[6] The *Sandstrom* Court also rejected the State's argument that the jury need not have relied on the challenged instruction in finding Sandstrom guilty of intentional murder. The State reasoned that because the tainted instruction could arguably be viewed as only relating to the defendant's "purpose," the jury might have convicted Sandstrom solely on the ground that he "knowingly" caused the death of the victim. Because the statute only requires that the crime be committed "purposefully *or* knowingly," the State argued that there was an alternative basis on which the conviction could be sustained. *Sandstrom* v. *Montana*, 442 U. S. 510, 525 (1979). Relying on *Stromberg* v. *California*, 283 U. S. 359 (1931), this Court refused to engage in such speculation, since "even if a jury *could* have ignored the presumption and found defendant guilty because he acted knowingly, we cannot be certain that this is what they *did* do." 442 U. S., at 526 (emphasis in original). There is similarly no way to tell whether respondent's jury adopted the Georgia Supreme Court's yet undisclosed interpretation of the Georgia death penalty statute.

If respondent's jury subscribed to this interpretation of their role, "their preconceptions were not dispelled by the trial judge's sentencing instructions." *Id.*, at 429. Indeed, everything about the judge's charge highlighted the importance of the aggravating circumstances. Not only were the circumstances submitted to the jury in writing, but the jury was in turn required to write down each and every aggravating circumstance that it found to be established beyond a reasonable doubt. See Ga. Code § 27–2534.1(c) discussed *supra*, at ——. The jury instructions provide absolutely no indication that, after carefully considering each of the stautory aggravating circumstances submitted by the trial judge, the jury should, or even could, discard this list of officially sanctioned grounds for imposing the death penalty in deciding whether to actually sentence respondent to death.

Absent even a shred of evidence that respondent's trial judge and jury were cognizant of petitioner's asserted construction of the Georgia death penalty statute, a construction never acknowledged by any Georgia appellate court, we can only speculate whether "the verdict in this case was not decisively affected by an unconstitutional statutory aggravating circumstance." *Stephens* v. *Zant*, 631 F. 2d, at 406. It is precisely to guard against such speculation that this Court has uniformly refused to uphold a conviction or sentence that might have been based even in part on an unconstitutional ground.[7] See *supra*, at ——. Furthermore, in *Gregg* v. *Georgia*, *supra*, at 189, this Court made clear that "where discretion is afforded a sentencing body on a matter so grave as the determination of whether a human life should be taken or spared, that discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action." See also *Furman* v. *Georgia*, 408 U. S. 238. Because nothing the Supreme Court of Georgia can say in response to this Court's certification will assure us that *respondent's jury* was "suitably directed,"[8] I must dissent.

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[7] It is irrelevant whether the jury's determination was only partially based on the presence of the unconstitutional aggravating circumstance. As this Court held in *Street* v. *New York*, 394 U. S. 576 (1969), "even assuming that the record precludes the inference that appellant's conviction might have been based *solely* on [an unconstitutional ground], we are still bound to reverse if the conviction could have been based upon *both*" an unconstitutional and a constitutional ground. *Id.*, at 587 (emphasis in original).

[8] The majority's implication that certifying this case will give the Georgia Supreme Court an opportunity to clarify whether it has the power to "assume the role of the jury when the sentencing jury recommended the death penalty under legally erroneous instructions," *ante*, at 5, does not alter my conclusion. In affirming respondent's death sentence, the Georgia Supreme Court did not purport to exercise such authority. Nor did the State argue that such action by the Georgia Supreme Court was permissible in the proceedings before this Court. Indeed, prior to this Court's action today, it has always been assumed that "only the trier of fact may impose a death sentence." *Willis* v. *Balkcom*, —— U. S. —— (1981) (MARSHALL, BRENNAN, and Stewart, JJ., dissenting from the denial of certiorari). In any event, a "reviewing court can determine only whether

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a rational jury might have imposed the death penalty if it had been properly instructed; it is impossible for it to say whether a particular jury would have so exercised its discretion if it had known the law." *Godfrey* v. *Georgia*, 446 U. S., at 437 (MARSHALL, J., concurring in the judgment).

SUPREME COURT OF THE UNITED STATES

No. 81-89

WALTER ZANT, WARDEN, PETITIONER, *v.*
ALPHA OTIS O'DANIEL STEPHENS

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

[May 3, 1982]

JUSTICE POWELL, dissenting.

I am in essential agreement with the views expressed by JUSTICE MARSHALL in Part II of his dissenting opinion, and with his conclusion that the death sentence was imposed under instructions that could have misled the jury. I would not hold, however, that the case must be remanded for resentencing *by a jury*.

The Court of Appeals for the Fifth Circuit simply reversed and remanded thus leaving it to the Georgia Supreme Court to determine whether resentencing by a jury is required in this case. It may be that under Georgia law the State Supreme Court lacks authority to resentence itself, rather than leave this role to a jury. If that should be the case, I would leave open—also for the Supreme Court of Georgia to decide—whether it has authority to find that the instruction was harmless error beyond a reasonable doubt.

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All issues available have been filmed.
Unfortunately, any scattered missing issues are no longer available.

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(Slip Opinion)

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Lumber Co.*, 200 U. S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

NORTHERN PIPELINE CONSTRUCTION CO. *v.* MARATHON PIPE LINE CO. ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MINNESOTA

No. 81–150. Argued April 27, 1982—Decided June 28, 1982*

The Bankruptcy Reform Act of 1978 (Act) established a United States bankruptcy court in each judicial district as an adjunct to the district court for such district. The bankruptcy court judges are appointed for 14-year terms, subject to removal by the judicial council of the circuit in which they serve on grounds of incompetence, misconduct, neglect of duty, or disability. Their salaries are set by statute and are subject to adjustment. The Act grants the bankruptcy courts jurisdiction over "all civil proceedings arising under title 11 [bankruptcy] [of the United States Code] or arising in or related to cases under title 11." See 18 U. S. C. § 1471(b) (1976 ed., Supp. III). After it had filed a petition for reorganization in a Bankruptcy Court, appellant Northern Pipeline Construction Co. (Northern) filed in that court a suit against appellee Marathon Pipe Line Co. (Marathon) seeking damages for an alleged breach of contract and warranty, as well as for misrepresentation, coercion, and duress. Marathon sought dismissal of the suit on the ground that the Act unconstitutionally conferred Art. III judicial power upon judges who lacked life tenure and protection against salary diminution. The Bankruptcy Court denied the motion to dismiss, but on appeal the District Court granted the motion.

Held: The judgment is affirmed.

12 B. R. 946, affirmed.

JUSTICE BRENNAN, joined by JUSTICE MARSHALL, JUSTICE BLACKMUN, and JUSTICE STEVENS, concluded that:

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*Together with No. 81–546, *United States* v. *Marathon Pipe Line Co. et al.*, also on appeal from the same court.

Ju 6.8/b:

Syllabus

1. Section 1471's broad grant of jurisdiction to bankruptcy judges violates Art. III. Pp. 6-33.

(a) The judicial power of the United States must be exercised by judges who have the attributes of life tenure and protection against salary diminution specified by Art. III. These attributes were incorporated into the Constitution to ensure the independence of the Judiciary from the control of the Executive and Legislative Branches. There is no doubt that bankruptcy judges created by the Act are not Art. III judges. Pp. 6–10.

(b) Article III bars Congress from establishing under its Art. I powers legislative courts to exercise jurisdiction over all matters arising under the bankruptcy laws. The establishment of such courts does not fall within any of the historically recognized situations—non-Art. III courts of the Territories or of the District of Columbia, courts-martial, and resolution of "public rights" issues—in which the principle of independent adjudication commanded by Art. III does not apply. The bankruptcy courts do not lie exclusively outside the States, like the courts of the Territories or of the District of Columbia, or bear any resemblence to courts-martial, nor can the substantive legal rights at issue in the present action—the right to recover contract damages to augment Northern's estate—be deemed "public rights." There is no persuasive reason in logic, history, or the Constitution, why bankruptcy courts lie beyond the reach of Art. III. Pp. 12–24.

(c) Section 1471 impermissibly removed most, if not all, the essential attributes of the judicial power from the Art. III district court and vested those attributes in a non-Art. III adjunct. *Crowell* v. *Benson*, 285 U. S. 22, and *United States* v. *Raddatz*, 447 U. S. 667, distinguished. Congress does not have the same power to create adjuncts to adjudicate constitutionally recognized rights and state-created rights as it does to adjudicate rights that it creates. The grant of jurisdiction to bankruptcy courts cannot be sustained as an exercise of Congress' power to create adjuncts to Art. III courts. Pp. 24–33.

2. The above holding that the broad grant of jurisdiction in § 1471 is unconstitutional shall not apply retroactively but only prospectively. Such grant of jurisdiction presents an unprecedented question of interpretion of Art. III, and retroactive application would not further the operation of the holding but would visit substantial injustice and hardship upon those litigants who relied upon the Act's vesting of jurisdiction in the bankruptcy courts. P. 33.

JUSTICE REHNQUIST, joined by JUSTICE O'CONNOR, concluded that where appellee Marathon Pipe Line Co. has simply been named defendant in appellant's suit on a contract claim arising under state law, the

Syllabus

constitutionality of the Bankruptcy Court's exercise of jurisdiction over that kind of suit is all that need be decided in this case; that resolution of any objections Marathon might make to the exercise of authority conferred on Bankruptcy Courts by the Bankruptcy Reform Act of 1978, on the ground that the suit must be decided by an Art. III court, should await the exercise of such authority; that so much of that Act as enables a Bankruptcy Court to entertain and decide appellant's suit over Marathon's objection violates Art. III; and that the Court's judgment should not be applied retroactively. Pp. —— - ——.

Brennan, J., announced the Court's judgment and delivered an opinion, in which **Marshall**, **Blackmun**, and **Stevens**, JJ., joined. **Rehnquist**, J., filed an opinion concurring in the judgment, in which **O'Connor**, J., joined. **Burger**, C. J., filed a dissenting opinion. **White**, J., filed a dissenting opinion, in which **Burger**, C. J., and **Powell**, J., joined.

[illegible]

[illegible]

[illegible]

[illegible]

[illegible]

[illegible] The above holding that the lower group of [illegible] unconstitutional shall not [illegible]

[illegible] and to [illegible]

NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D.C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

SUPREME COURT OF THE UNITED STATES

Nos. 81–150 AND 81–546

NORTHERN PIPELINE CONSTRUCTION CO.,
APPELLANT
81–150 *v.*
MARATHON PIPE LINE COMPANY AND
UNITED STATES

UNITED STATES, APPELLANT
81–546 *v.*
MARATHON PIPE LINE CO. ET AL.

ON APPEALS FROM THE UNITED STATES DISTRICT COURT FOR
THE DISTRICT OF MINNESOTA

[June 28, 1982]

JUSTICE BRENNAN announced the judgment of the Court and delivered an opinion in which JUSTICE MARSHALL, JUSTICE BLACKMUN, and JUSTICE STEVENS joined.

The question presented is whether the assignment by Congress to bankruptcy judges of the jurisdiction granted in § 241(a) of the Bankruptcy Act of 1978, 28 U. S. C. § 1471 (1976 ed., Supp. III), violates Art. III of the Constitution.

I

A

In 1978, after almost ten years of study and investigation, Congress enacted a comprehensive revision of the bankruptcy laws. The Bankruptcy Act of 1978 (Act)[1] made significant changes in both the substantive and procedural law of bankruptcy. It is the changes in the latter that are at issue in this case.

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[1] Pub. L. 95-598, 92 Stat. 2549. The Act became effective October 1,

Before the Act, federal district courts served as bankruptcy courts and employed a "referee" system. Bankruptcy proceedings were generally conducted before referees,[2] except in those instances in which the district court elected to withdraw a case from a referee. See Bkrptcy. Rule 102. The referee's final order was appealable to the district court. Bkrptcy. Rule 801. The bankruptcy courts were vested with "summary jurisdiction"—that is, with jurisdiction over controversies involving property in the actual or constructive possession of the court. And, with consent, the bankruptcy court also had jurisdiction over some "plenary" matters—such as disputes invoiving property in the possession of a third person.

The Act eliminates the referee system and establishes "in each judicial district, as an adjunct to the district court for such district, a bankruptcy court which shall be a court of record known as the United States Bankruptcy Court for the district." 28 U. S. C. § 151(a) (1976 ed., Supp. III). The judges of these courts are appointed to office for 14-year terms by the President, with the advice and consent of the Senate. §§ 152, 153(a). They are subject to removal by the "judicial council of the circuit" on account of "incompetence, misconduct, neglect of duty or physical or mental disability." § 153(b). In addition, the salaries of the bankruptcy judges are set by statute and are subject to adjustment under the Federal Salary Act, 2 U. S. C. §§ 351–361. 28 U. S. C. § 154 (1976 ed., Supp. III).

The jurisdiction of the bankruptcy courts created by the

1979.

[2] Bankruptcy referees were redesignated as "judges" in 1973. Bkrptcy. Rule 901(7). For purposes of clarity, however, we refer to all judges under the old Act as "referees."

Act is much broader than that exercised under the former referee system. Eliminating the distinction between "summary" and "plenary" jurisdiction, the Act grants the new courts jurisdiction over all "civil proceedings arising under title 11 [the Bankruptcy title] or arising in or *related to* cases under title 11." 28 U. S. C. § 1471(b) (1976 ed., Supp. III) (emphasis added).[3] This jurisdictional grant empowers bankruptcy courts to entertain a wide variety of cases involving claims that may affect the property of the estate once a petition has been filed under title 11 of the Act. Included within the bankruptcy courts' jurisdiction are suits to recover accounts, controversies involving exempt property, actions to avoid transfers and payments as preferences or fraudulent conveyances, and causes of action owned by the debtor at the time of the petition for bankruptcy. The bankruptcy courts can hear claims based on state law as well as those based on federal law. See 1 Collier on Bankruptcy, ¶3.01, at 3-47 to 3-48 (15th ed. 1981).[4]

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[3] Although the Act initially vests this jurisdiction in district courts, 28 U. S. C. § 1471(a) (1976 ed., Supp. III), it subsequently provides that "[t]he bankruptcy court for the district in which a case under title 11 is commenced shall exercise *all* of the jurisdiction conferred by this section on the district courts," § 1471(c) (emphasis added). Thus the ultimate repository of the Act's broad jurisdictional grant is the bankruptcy courts. See 1 Collier on Bankruptcy ¶3.01, at 3-37, 3-44 to 3-49 (15th ed. 1981).

[4] With respect to both personal jurisdiction and venue, the scope of the Act is also expansive. Although the Act does not in terms indicate the extent to which bankruptcy judges may exercise personal jurisdiction, it has been construed to allow the constitutional maximum. See, *e. g.*, *In re Whippany Paper Board Co.*, 15 B.R. 312, 314-315 (Bkrptcy. Ct. D NJ 1981). With two exceptions not relevant here, the venue of "a proceeding arising in or related to a case under title 11 . . . [is] in the bankruptcy court in which such case is pending." 28 U. S. C. § 1473(a) (1976 ed., Supp. III). Furthermore, the Act permits parties to remove many kinds of action to the bankruptcy court. Parties "may remove any claim or cause of action in a civil action, other than a proceeding before the United States Tax Court or a civil action by a Government unit to enforce such governmental unit's police or regulatory power". § 1478. The bankruptcy court may, how-

The judges of the bankruptcy courts are vested with all of the "powers of a court of equity, law and admiralty," except that they "may not enjoin another court or punish a criminal contempt not committed in the presence of the judge of the court or warranting a punishment of imprisonment." 28 U. S. C. § 1481 (1976 ed., Supp. III). In addition to this broad grant of power, Congress has allowed bankruptcy judges the power to hold jury trials, § 1480; to issue declaratory judgments, § 2201; to issue writs of habeas corpus under certain circumstances, § 2256; to issue all writs necessary in aid of the bankruptcy court's expanded jurisdiction, § 451; see 28 U. S. C. § 1651 (1976 ed.); and to issue any order, process or judgment that is necessary or appropriate to carry out the provisions of title 11, 11 U. S. C. § 105(a) (1976 ed., Supp. III).

The Act also establishes a special procedure for appeals from orders of bankruptcy courts. The circuit council is empowered to direct the Chief Judge of the circuit to designate panels of three bankruptcy judges to hear appeals. 28 U. S. C. § 160 (1976 ed., Supp. III). These panels have jurisdiction of all appeals from final judgments, orders, and decrees of bankruptcy courts, and, with leave of the panel, of interlocutory appeals. § 1482. If no such appeals panel is designated, the district court is empowered to exercise appellate jurisdiction. § 1334. The court of appeals is given jurisdiction over appeals from the appellate panels or from the district court. § 1293. If the parties agree, a direct appeal to the court of appeals may be taken from a final judgment of a bankruptcy court. § 1293(b).[5]

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ever, remand such actions "on any equitable ground"; the decision to remand or retain an action is unreviewable. § 1478(b).

[5] Although no particular standard of review is specified in the Act, the parties in the present case seem to agree that the appropriate one is the clearly erroneous standard, employed in the old Bankruptcy Rule 801 for review of findings of fact made by a referee. See Brief for the United States 41; Tr. of Oral Arg. 27. See also *In re Rivers*, —— B.R. ——

The Act provides for a transition period before the new provisions take full effect in April 1984. Bankruptcy Act of 1978, §§401–411, 92 Stat. 2682–2688. During the transition period, previously existing bankruptcy courts continue in existence. §404(a), 92 Stat. 2683. Incumbent bankruptcy referees, who served six-year terms for compensation subject to adjustment by Congress, are to serve as bankruptcy judges until March 31, 1984, or until their successors take office. §404(b), 92 Stat. 2683.[6] During this period they are empowered to exercise essentially all of the jurisdiction and powers discussed above. See §§404, 405, 92 Stat. 2683–2685. See generally 1 Collier on Bankruptcy ¶¶7.04–7.05, 7–23 to 7–65 (15th ed. 1981). The procedure for taking appeals is similar to that provided after the transition period. See §405(c)(1), 92 Stat. 2685.[7]

B

This case arises out of proceedings initiated in the United States Bankruptcy Court for the District of Minnesota after appellant Northern Pipeline Construction Co. (Northern) filed a petition for reorganization in January 1980. In March 1980 Northern, pursuant to the Act, filed in that court a suit against appellee Marathon Pipeline Co. (Marathon). Appellant sought damages for alleged breaches of contract and warranty, as well as for alleged misrepresentation, coercion, and duress. Marathon sought dismissal of the suit, on the ground that the Act unconstitutionally conferred Art. III judicial power upon judges who lacked life tenure and protec-

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(Bkrptcy. Ct. ED Tenn. 1982); 1 Collier on Bankruptcy ¶3.03, at 3–315 (15th ed. 1981).

[6] Under the old Bankruptcy Act, referees could be removed by the district court for "incompetency, misconduct, or neglect of duty," 11 U. S. C. §62(b) (1976 ed.); the same grounds for removal apply during the transition period, see §404(d), 92 Stat. 2684.

[7] It appears, however, that during the transition period an appeal of a bankruptcy judge's decision may be taken to the district court even if an appellate panel of bankruptcy judges has been established.

tion against salary diminution. The United States intervened to defend the validity of the statute.

The bankruptcy judge denied the motion to dismiss. App. to Juris. Statement 27a–36a. But on appeal the District Court entered an order granting the motion, on the ground that "the delegation of authority in 28 U. S. C. § 1471 to the Bankruptcy Judges to try cases otherwise relegated under the Constitution to Article III judges" was unconstitutional. *Id.*, at 1a. Both the United States and Northern filed notices of appeal in this Court.[8] We noted probable jurisdiction. — U. S. — (1981).[9]

II

A

Basic to the constitutional structure established by the Framers was their recognition that "The accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny." The Federalist No. 47 (J. Madison), p. 300 (H. Lodge ed. 1888). To ensure against such tyranny, the Framers provided that the Federal Government would consist of three distinct Branches, each to exercise one of the governmental powers recognized by the Framers as inherently distinct. "The Framers regarded the checks and balances that they had built into the tripartite Federal Government as a self-executing safeguard against the encroachment or aggrandizement of one branch at the expense of the other." *Buckley* v. *Valeo,* 424 U. S. 1, 122 (1976) (*per curiam*).

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[8] After Northern docketed an appeal in this Court, the District Court supplemented its order with a memorandum. App. to Juris. Statement 3a–26a.

[9] Two other bankruptcy courts have considered the constitutionality of § 1471: The Bankruptcy Court for the District of Puerto Rico determined it to be constitutional, *In re Segarra*, 14 B.R. 870 (1981), while the Bankruptcy Court for the Eastern District of Tennessee reached the opposite conclusion, *In re Rivers, supra.*

The Federal Judiciary was therefore designed by the Framers to stand independent of the Executive and Legislature—to maintain the checks and balances of the constitutional structure, and also to guarantee that the process of adjudication itself remained impartial. Hamilton explained the importance of an independent Judiciary:

> "Periodical appointments, however regulated, or by whomsoever made, would, in some way or other, be fatal to [the courts'] necessary independence. If the power of making them was committed either to the Executive or legislature, there would be danger of an improper complaisance to the branch which possessed it; if to both, there would be an unwillingness to hazard the displeasure of either; if to the people, or to persons chosen by them for the special purpose, there would be too great a disposition to consult popularity, to justify a reliance that nothing would be consulted but the Constitution and the laws." The Federalist No. 78, p. 489 (H. Lodge ed. 1888).

The Court has only recently reaffirmed the significance of this feature of the Framers' design: "A Judiciary free from control by the Executive and Legislature is essential if there is a right to have claims decided by judges who are free from potential domination by other branches of government." *United States* v. *Will,* 449 U. S. 200, 217–218 (1980).

As an inseparable element of the constitutional system of checks and balances, and as a guarantee of judicial impartiality, Art. III both defines the power and protects the independence of the Judicial Branch. It provides that "The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish." Art. III, § 1. The inexorable command of this provision is clear and definite: The judicial power of the United States must be exercised by courts having the attributes prescribed in Art. III. Those attributes are also clearly set forth:

> "The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office." Art. III, § 1.

The "good Behaviour" Clause guarantees that Art. III judges shall enjoy life tenure, subject only to removal by impeachment. *Toth* v. *Quarles*, 350 U. S. 11, 16 (1955). The Compensation Clause guarantees Art. III judges a fixed and irreducible compensation for their services. *United States* v. *Will*, *supra*, at 218–221. Both of these provisions were incorporated into the Constitution to ensure the independence of the judiciary from the control of the executive and legislative branches of government.[10] As we have only recently emphasized, "The Compensation Clause has its roots in the longstanding Anglo-American tradition of an independent Judiciary," *id.*, at 217, while the principle of life tenure can be traced back at least as far as the Act of Settlement in 1701, *id.*, at 218. To be sure, both principles were eroded during the late colonial period, but that departure did not escape notice and indignant rejection by the Revolutionary generation. Indeed, the guarantees eventually included in Art.

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[10] These provisions serve other institutional values as well. The independence from political forces that they guarantee helps to promote public confidence in judicial determinations. See The Federalist No. 78 (A. Hamilton). The security that they provide to members of the Judicial Branch helps to attract well qualified persons to the federal bench. *Ibid.* The guarantee of life tenure insulates the individual judge from improper influences not only by other branches but by colleagues as well, and thus promotes judicial individualism. See Kaufman, Chilling Judicial Independence, 88 Yale L. J. 681, 713 (1979). See generally Note, Article III Limits on Article I Courts: The Constitutionality of the Bankruptcy Court and the 1979 Magistrate Act, 80 Colum. L. Rev. 560, 583–585 (1980).

III were clearly foreshadowed in the Declaration of Independence, "which, among the injuries and usurpations recited against the King of Great Britain, declared that he had 'made judges dependent on his will alone, for the tenure of their offices, and the amount and payment of their salaries.'" *O'Donoghue* v. *United States*, 289 U. S. 516, 531 (1933). The Framers thus recognized that

> "Next to permanency in office, nothing can contribute more to the independence of the judges than a fixed provision for their support. . . . In the general course of human nature, *a power over a man's subsistence amounts to a power over his will.*" The Federalist No. 79 (A. Hamilton), p. 491 (H. Lodge ed. 1888) (emphasis in original).[11]

In sum, our Constitution unambiguously enunciates a fundamental principle—that the "judicial Power of the United States" must be reposed in an independent Judiciary. It commands that the independence of the Judiciary be jealously guarded, and it provides clear institutional protections for that independence.

B

It is undisputed that the bankruptcy judges whose offices were created by the Bankruptcy Act of 1978 do not enjoy the protections constitutionally afforded to Art. III judges. The bankruptcy judges do not serve for life subject to their continued "good Behaviour." Rather, they are appointed for 14-year terms, and can be removed by the judicial council of the circuit in which they serve on grounds of "incompetence, misconduct, neglect of duty or physical or mental disability." Second, the salaries of the bankruptcy judges are not immune from diminution by Congress. See *supra*, at 2. In short, there is no doubt that the bankruptcy judges created by the Act are not Art. III judges.

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[11] Further evidence of the Framers' concern for assuring the independence of the judicial branch may be found in the fact that the Constitutional Convention soundly defeated a proposal to allow the removal of judges by the executive and legislative branches. See 2 Farrand, Records of the Federal Convention 428–429 (1911); P. Bator, P. Mishkin, D. Shapiro, & H. Wechsler, Hart and Wechsler's The Federal Courts and the Federal System 7 (2d ed. 1973). Mr. Wilson, of Pennsylvania, commented that "The Judges would be in a bad situation if made to depend on every gust of faction which might prevail in the two branches of our Govt." 2 Farrand, *supra*, at 429.

That Congress chose to vest such broad jurisdiction in non-Art. III bankruptcy courts, after giving substantial consideration to the constitutionality of the Act, is of course reason to respect the congressional conclusion. See *Fullilove* v. *Klutznick*, 448 U. S., 448 472–473 (1980) (opinion of BURGER, C. J.); *Palmore* v. *United States*, 411 U. S. 389, 409 (1973). See also *National Ins. Co.* v. *Tidewater Co.*, 337 U. S. 582, 655 (1949) (Frankfurter, J., dissenting).[12] But at the same time,

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[12] It should be noted, however, that the House of Representatives expressed substantial doubts respecting the constitutionality of the provisions eventually included in the Act. The House Judiciary Committee and its Subcommittee on Civil and Constitutional Rights gave lengthy consideration to the constitutional issues surrounding the conferral of broad powers upon the new bankruptcy courts. The committee, the subcommittee, and the House as a whole initially concluded that Art. III courts were constitutionally required for bankruptcy adjudications. See H.R. 8200, 95th Cong., 1st Sess. (1977); Hearings on H.R. 31 and H.R. 32 before the Subcommittee on Civil and Constitutional Rights of the House Committee on the Judiciary, 94th Cong., 2d Sess., 2081–2084 (1976); *id.*, at 2682–2706; H.R. Rep. No. 95–595, p. 39 (1977) ("Article III is the constitutional norm, and the limited circumstances in which the courts have permitted departure from the requirements of Article III are not present in the bankruptcy context"); *id.*, at 21–38; Subcomm. on Civil and Constitutional Rights of the House Committee on the Judiciary, Constitutional Bankruptcy Courts, 95th Cong., 2d Sess., 33 (Comm. Print No. 3 1977) (concluding that the proposed bankruptcy courts should be established "under Article III, with all of the protection that the Framers intended for an independent judiciary"); Subcomm. on Civil and Connstitutional Rights of the House Comm. on the Judiciary, Report on Hearings on the Court Administration

> "Deciding whether a matter has in any measure been committed by the Constitution to another branch of government, or whether the action of that branch exceeds whatever authority has been committed, is itself a delicate exercise in constitutional interpretation, and is a responsibility of this Court as ultimate interpreter of the Constitution." *Baker* v. *Carr*, 369 U. S. 186, 211 (1962).

With these principles in mind, we turn to the question presented for decision: whether the Bankruptcy Act of 1978 violates the command of Art. III, that the judicial power of the United States must be vested in courts whose judges enjoy the protections and safeguards specified in that Article.

Appellants suggest two grounds for upholding the Act's conferral of broad adjudicative powers upon judges unprotected by Art. III. First, it is urged that "pursuant to its enumerated Article I powers, Congress may establish legislative courts that have jurisdiction to decide cases to which the Article III judicial power of the United States extends." Brief for the United States 9. Referring to our precedents upholding the validity of "legislative courts," appellants suggest that "the plenary grants of power in Article I permit Congress to establish non-Article III tribunals in 'specialized areas having particularized needs and warranting distinctive treatment,'" such as the area of bankruptcy law. *Ibid.*, quoting *Palmore* v. *United States*, 411 U. S. 389, 408 (1973).

Structure for Bankruptcy Cases, 95th Cong., 2d Sess., 5 (Comm. Print No. 13 1978) (same); see generally Klee, Legislative History of the New Bankruptcy Law, 28 De Paul L. Rev. 941, 945–949, 951 (1979). The Senate bankruptcy bill did not provide for life tenure or a guaranteed salary, instead adopting the concept of a bankruptcy court with similarly broad powers but as an "adjunct" to an Art. III court. S. 2266, 95th Cong., 2d Sess. (1978). The bill that was finally enacted, denying bankruptcy judges the tenure and compensation protections of Art. III, was the result of a series of last minute conferences and compromises between the managers of both houses. See Klee, *supra*, at 952–956

Second, appellants contend that even if the Constitution does require that this bankruptcy-related action be adjudicated in an Art. III court, the Act in fact satisfies that requirement. "Bankruptcy jurisdiction was vested in the district court" of the judicial district in which the bankruptcy court is located, "and the exercise of that jurisdiction by the adjunct bankruptcy court was made subject to appeal as of right to an Art. III court." *Id.*, at 12. Analogizing the role of the bankruptcy court to that of a special master, appellants urge us to conclude that this "adjunct" system established by Congress satisfies the requirements of Art. III. We consider these arguments in turn.

III

Congress did not constitute the bankruptcy courts as legislative courts.[13] Appellants contend, however, that the bankruptcy courts could have been so constituted, and that as a result the "adjunct" system in fact chosen by Congress does not impermissibly encroach upon the judicial power. In advancing this argument, appellants rely upon cases in which we have identified certain matters that "congress may or may not bring within the cognizance of [Art. III] courts, as it may deem proper." *Murray's Lessee* v. *Hoboken Land and Improvement Co.*, 18 How. 272, 284 (1855).[14] But when properly understood, these precedents represent no broad departure from the constitutional command that the judicial power of the United States must be vested in Art. III courts.[15] Rather, they reduce to three narrow situations not subject to that command, each recognizing a circumstance in which the grant of power to the Legislative and Executive Branches was historically and constitutionally so exceptional that the congressional assertion of a power to create legislative courts was consistent with, rather than threatening to, the constitutional mandate of separation of powers. These precedents simply acknowledge that the literal command of Art. III, assigning the judicial power of the United States to courts insulated from Legislative or Executive interference, must be interpreted in light of the historical context in which the Constitution was written, and of the structural imperatives of the Constitution as a whole.

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[13] The Act designates the bankruptcy court in each district as an "adjunct" to the district court. 28 U. S. C. § 151(a) (1976 ed., Supp. III). Neither House of Congress concluded that the bankruptcy courts should be established as independent legislative courts. See n. 12, *supra*.

[14] At one time, this Court suggested a rigid distinction between those subjects that could be considered only in Art. III courts and those that could be considered only in legislative courts. See *Williams* v. *United States*, 289 U. S. 553 (1933). But this suggested dichotomy has not withstood analysis. See Wright, Law of the Federal Courts 33–35 (3d ed. 1976). Our more recent cases clearly recognize that legislative courts may be granted jurisdiction over some cases and controversies to which the Art. III judicial power might also be extended. *E. g., Palmore* v. *United States*, 411 U. S. 389 (1973). See *Glidden* v. *Zdanok*, 370 U. S. 530,

Appellants first rely upon a series of cases in which this Court has upheld the creation by Congress of non-Art. III "territorial courts." This exception from the general prescription of Art. III dates from the earliest days of the Republic, when it was perceived that the Framers intended that

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549–551 (1962) (Opinion of Harlan, J.).

[15] JUSTICE WHITE'S dissent finds particular significance in the fact that Congress could have assigned all bankruptcy matters to the state courts. *Post*, at 25. But, of course, virtually all matters that might be heard in Art. III courts could also be left by Congress to state courts. This fact is simply irrelevant to the question before us. Congress has no control over state court judges; accordingly the principle of separation of powers is not threatened by leaving the adjudication of federal disputes to such judges. See Krattenmaker, Article III and Judicial Independence: Why the New Bankruptcy Courts are Unconstitutional, 70 Geo. L J. 297, 304–305 (1981). The Framers chose to leave to Congress the precise role to be played by the lower federal courts in the administration of justice. See Hart and Wechsler's The Federal Courts and the Federal System, *supra*, at 11. But the Framers did not leave it to Congress to define the character of those courts—they were to be independent of the political branches and presided over by judges with guaranteed salary and life tenure.

as to certain geographical areas, in which no State operated as sovereign, Congress was to exercise the general powers of government. For example, in *American Ins. Co.* v. *Canter*, 1 Pet. 511 (1828), the Court observed that Art. IV bestowed upon Congress alone a complete power of government over territories not within the States that comprised the United States. The Court then acknowledged Congress' authority to create courts for those territories that were not in conformity with Art. III. Such courts were

> "created in virtue of the general right of sovereignty which exists in the government, or in virtue of that clause which enables Congress to make all needful rules and regulations, respecting the territory belonging to the United States. The jurisdiction with which they are invested . . . is conferred by Congress, in the execution of those general powers which that body possesses over the territories of the United States. Although admiralty jurisdiction can be exercised in the states in those Courts, only, which are established in pursuance of the 3d article of the Constitution; the same limitation does not extend to the territories. In legislating for them, Congress exercises the combined powers of the general, and of a state government." 1 Pet., at 546.

The Court followed the same reasoning when it reviewed Congress' creation of non-Art. III courts in the District of Columbia. It noted that there was in the District

> "no division of powers between the general and state governments. Congress has the entire control over the district for every purpose of government; and it is reasonable to suppose, that in organizing a judicial department here, all judicial power necessary for the purposes of government would be vested in the courts of justice." *Kendall* v. *United States*, 12 Pet. 524, 619 (1838).[16]

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[16] We recently reaffirmed the principle, expressed in these early cases,

Appellants next advert to a second class of cases—those in which this Court has sustained the exercise by Congress and the Executive of the power to establish and administer courts martial. The situation in these cases strongly resembles the situation with respect to territorial courts: It too involves a constitutional grant of power that has been historically understood as giving the political branches of Government extraordinary control over the precise subject matter at issue. Art. I, §8, cls. 13, 14, confer upon Congress the power "to provide and maintain a Navy," and "to make Rules for the Government and Regulation of the land and naval Forces." The Fifth Amendment, which requires a presentment or indictment of a grand jury before a person may be held to answer for a capital or otherwise infamous crime, contains an express exception for "cases arising in the land or naval forces." And Art. II, §2, cl. 1, provides that "The President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States." Noting these constitutional directives, the Court in *Dynes* v. *Hoover*, 20 How. 65 (1858), explained:

> "These provisions show that Congress has the power to provide for the trial and punishment of military and naval offences in the manner then and now practiced by civilized nations; and that the power to do so is given without any connection between it and the 3d article of the Constitution defining the judicial power of the

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that Art. I, §8, cl. 17, provides that Congress shall have power "[t]o exercise exclusive legislation in all cases whatsoever, over" the District of Columbia. *Palmore* v. *United States*, 411 U. S. 389, 397 (1973). See also *Wallace* v. *Adams*, 204 U. S. 415, 423 (1907) (recognizing Congress' authority to establish legislative courts to determine questions of tribal membership relevant to property claims within Indian territory); *In re Ross*, 140 U. S. 453 (1891) (same, respecting consular courts established by concession from foreign countries). See generally 1 Moore, Federal Practice 46–49, 53–54 (2d. ed. 1982). But see *Reid* v. *Covert*, 354 U. S. 1 (1957).

> United States; indeed, that the two powers are entirely independent of each other." *Id.*, at 79.[17]

Finally, appellants rely on a third group of cases, in which this Court has upheld the constitutionality of legislative courts and administrative agencies created by Congress to adjudicate cases involving "public rights."[18] The "public rights" doctrine was first set forth in *Murray's Lessee* v. *Hoboken Land & Improvement Co.*, 18 How. 272 (1855):

> [W]e do not consider congress can either withdraw from judicial cognizance any matter which, from its nature, is the subject of a suit at the common law, or in equity, or admiralty; nor, on the other hand, can it bring under the judicial power a matter which, from its nature, is not a subject for judicial determination. At the same time there are matters, *involving public rights*, which may be presented in such form that the judicial power is capable of acting on them, and which are susceptible of judicial determination, but which congress may or may not bring within the cognizance of the courts of the United States, as it may deem proper." *Id.*, at 284 (emphasis added).

This doctrine may be explained in part by reference to the traditional principle of sovereign immunity, which recognizes that the Government may attach conditions to its consent to be sued. See *id.* at 283–285; see also *Ex parte Bakelite*

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[17] See also *Burns* v. *Wilson*, 346 U. S. 137, 139–140 (1953). But this Court has been alert to ensure that Congress does not exceed the constitutional bounds and bring within the jurisdiction of the military courts matters beyond that jurisdiction, and properly within the realm of "judicial power." See, *e. g.*, *Reid* v. *Covert*, *supra; Toth* v. *Quarles*, 350 U. S. 11 (1955).

[18] Congress' power to create legislative courts to adjudicate public rights carries with it the lesser power to create administrative agencies for the same purpose, and to provide for review of those agency decisions in Art. III courts. See, *e. g.*, *Atlas Roofing Co.* v. *Occupational Safety Comm'n*, 430 U. S. 442, 450 (1977).

Corp., 279 U. S. 438, 452 (1929). But the public-rights doctrine also draws upon the principle of separation of powers, and an historical understanding that certain prerogatives were reserved to the political branches of government. The doctrine extends only to matters arising "between the Government and persons subject to its authority in connection with the performance of the constitutional functions of the executive or legislative departments," *Crowell* v. *Benson*, 285 U. S. 22, 50 (1932), and only to matters that historically could have been determined exclusively by those departments, see *Ex parte Bakelite Corp.*, *supra*, at 458. The understanding of these cases is that the Framers expected that Congress would be free to commit such matters completely to non-judicial executive determination, and that as a result there can be no constitutional objection to Congress' employing the less drastic expedient of committing their determination to a legislative court or an administrative agency. *Crowell* v. *Benson*, *supra*, at 50.[19]

The public-rights doctrine is grounded in a historically recognized distinction between matters that could be conclusively determined by the Executive and Legislative Branches and matters that are "inherently . . . judicial." *Ex parte Bakelite Corp.*, *supra*, at 458. See *Murray's Lessee* v. *Hoboken Land & Improvement Co.*, *supra*, at 280–282. For example, the Court in *Murray's Lessee* looked to the law of England and the States at the time the Constitution was adopted, in order to determine whether the issue presented was customarily cognizable in the courts. *Ibid.* Concluding that the matter had not traditionally been one for judicial determination, the Court perceived no bar to Congress' establishment of summary procedures, outside of Art. III courts, to collect a debt due to the Government from one of its customs agents.[20] On the same premise, the Court in *Ex*

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[19] See *Oceanic Nav. Co.* v. *Stranahan*, 214 U. S. 320, 339 (1909); Katz, Federal Legislative Courts, 43 Harv. L. Rev. 894, 915 (1930).

[20] Doubtless it could be argued that the need for independent judicial

parte Bakelite Corp., *supra*, held that the Court of Customs Appeals had been properly constituted by Congress as a legislative court:

> "The *full* province of the court under the act creating it is that of determining matters arising between the Government and others in the executive administration and application of the customs laws. . . . The appeals include nothing which inherently or necessarily requires judicial determination, but only matters the determination of *which may be, and at times has been, committed exclusively to executive officers.*" 279 U. S., at 458 (emphasis added).[21]

The distinction between public rights and private rights has not been definitively explained in our precedents.[22] Nor is it necessary to do so in the present case, for it suffices to observe that a matter of public rights must at a minimum arise "between the government and others." *Ex Parte Bakelite Corp.*, *supra*, at 451.[23] In contrast, "the liability of one

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determination is greatest in cases arising between the government and an individual. But the rationale for the public-rights line of cases lies not in political theory, but rather in Congress' and this Court's understanding of what power was reserved to the Judiciary by the Constitution as a matter of historical fact.

[21] See also *Williams* v. *United States*, 289 U. S. 553 (1933) (holding that Court of Claims was a legislative court and that salary of a judge of that court could therefore be reduced by Congress).

[22] *Crowell* v. *Benson*, 285 U. S. 22 (1932), attempted to catalogue some of the matters that fall within the public-rights doctrine:

"Familiar illustrations of administrative agencies created for the determination of such matters are found in connection with the exercise of the congressional power as to interstate and foreign commerce, taxation, immigration, the public lands, public health, the facilities of the post office, pensions, and payments to veterans." *Id.*, at 51 (footnote omitted).

[23] Congress cannot "withdraw from [Art. III] judicial cognizance *any* matter which, *from its nature*, is the subject of a suit at common law, or in equity or admiralty." *Murray's Lessee* v. *Hoboken Land & Improvement*

individual to another under the law as defined," *Crowell* v. *Benson*, 285 U. S., at 51, is a matter of private rights. Our precedents clearly establish that *only* controversies in the former category may be removed from Art. III courts and delegated to legislative courts or administrative agencies for their determination. See *Atlas Roofing Co.* v. *Occupational Safety Comm'n*, 430 U. S., at 450, n. 7; *Crowell* v. *Benson*, *supra*, at 50–51. See also Katz, Federal Legislative Courts, 43 Harv. L. Rev. 894, 917–918 (1930).[24] Private-rights disputes, on the other hand, lie at the core of the historically recognized judicial power.

In sum, this Court has identified three situations in which Art. III does not bar the creation of legislative courts. In each of these situations, the Court has recognized certain exceptional powers bestowed upon Congress by the Constitution or by historical consensus. Only in the face of such an exceptional grant of power has the Court declined to hold the authority of Congress subject to the general prescriptions of Art. III.[25]

Co., 18 How., at 284 (emphasis added). It is thus clear that the presence of the United States as a proper party to the proceeding is a necessary but not sufficient means of distinguishing "private rights" from "public rights." And it is also clear that even with respect to matters that arguably fall within the scope of the "public rights" doctrine, the presumption is in favor of Art. III courts. See *Glidden* v. *Zdanok*, 370 U. S. 530, 548–549, and n. 21 (1962) (opinion of Harlan, J.). See also Currie, The Federal Courts and the American Law Institute, pt. 1, 36 U. Chi. L. Rev. 1, 13–14, n. 67 (1968). Moreover, when Congress assigns these matters to administrative agencies, or to legislative courts, it has generally provided, and we have suggested that it may be required to provide, for Art. III judicial review. See *Atlas Roofing Co.* v. *Occupational Safety Comm'n*, 430 U. S. 442, 455, n. 13 (1977).

[24] Of course, the public-rights doctrine does not extend to any criminal matters, although the government is a proper party. See, *e. g.*, *Toth* v. *Quarles*, 350 U. S. 11 (1955).

[25] The "unifying principle" that JUSTICE WHITE'S dissent finds lacking in all of these cases, see *post*, at 14, is to be found in the exceptional constitu-

We discern no such exceptional grant of power applicable in the case before us. The courts created by the Bankruptcy Act of 1978 do not lie exclusively outside the States of the Federal Union, like those in the District of Columbia and the territories. Nor do the bankruptcy courts bear any resemblance to courts martial, which are founded upon the Constitution's grant of plenary authority over the Nation's military forces to the Legislative and Executive Branches. Finally, the substantive legal rights at issue in the present action cannot be deemed "public rights." Appellants argue that a discharge in bankruptcy is indeed a "public right," similar to such congressionally created benefits as "radio station licenses, pilot licenses, and certificates for common carriers" granted by administrative agencies. See Brief for the United States 34. But the restructuring of debtor-creditor

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tional grants of power to Congress with respect to certain matters. Although the dissent is correct that these grants are not explicit in the language of the Constitution, they are nonetheless firmly established in our historical understanding of the constitutional structure. When these three exceptional grants are properly constrained, they do not threaten the Framers' vision of an independent federal judiciary. What clearly remains subject to Art. III are all private adjudications in federal courts within the States—matters from their nature subject to "a suit at common law or in equity or admiralty"—and all criminal matters, with the narrow exception of military crimes. There is no doubt that when the Framers assigned the "judicial Power" to an independent Art. III branch, these matters lay at what they perceived to be the protected core of that power.

Although the dissent recognizes that the Framers had something important in mind when they assigned the judicial power of the United States to Art. III courts, it concludes that our cases and subsequent practice have eroded this conception. Unable to find a satisfactory theme in our precedents for analyzing this case, the dissent rejects all of them, as well as the historical understanding upon which they were based, in favor of an ad hoc balancing approach in which Congress can essentially determine for itself whether Art. III courts are required. See *post*, at 14–25. But even the dissent recognizes that the notion that Congress rather than the Constitution should determine whether there is a need for independent federal courts cannot be what the Framers had in mind. See *post*, at 22.

relations, which is at the core of the federal bankruptcy power, must be distinguished from the adjudication of state-created private rights, such as the right to recover contract damages that is at issue in this case. The former may well be a "public right," but the latter obviously is not. Appellant Northern's right to recover contract damages to augment its estate is "one of private right, that is, of the liability of one individual to another under the law as defined." *Crowell* v. *Benson*, 285 U. S., at 51.[38]

Recognizing that the present case may not fall within the scope of any of any of our prior cases permitting the establishment of legislative courts, appellants argue that we should recognize an additional situation beyond the command of Art. III, sufficiently broad to sustain the Act. Appellants contend that Congress' constitutional authority to establish "uniform Laws on the subject of Bankruptcies throughout the United States," Art. I, §8, cl.4, carries with it an inherent power to establish legislative courts capable of adjudicating "bankruptcy related controversies." Brief for the United States 14 In support of this argument, appellants rely primarily upon a quotation from the opinion in *Palmore* v. *United States*, 411 U. S. 389 (1973), in which we stated that

> "both Congress and this Court have recognized that . . . the requirements of Art. III, which are applicable where laws of national applicablity and affairs of national con-

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[38] This claim may be adjudicated in federal court on the basis of its relationship to the petition for reorganization. See *Williams* v. *Austrian*, 331 U. S. 642 (1947); *Schumacher* v. *Beeler*, 293 U. S. 367 (1934). See also *National Ins. Co.* v. *Tidewater Co.*, 337 U. S. 582, 611–613 (1949) (Rutledge, J., concurring); *Textile Workers* v. *Lincoln Mills*, 353 U. S. 448, 472 (1957) (Frankfurter, J., dissenting). Cf. *Osborn* v. *United States Bank*, 9 Wheat. 738 (1824). But this relationship does not transform the state-created right into a matter between the Government and the petitioner for reorganization. Even in the absence of the federal scheme, the plaintiff would be able to proceed against the defendant on the state-law contractual claims.

> cern are at stake, must in proper circumstances give way to accommodate plenary grants of power to Congress to legislate with respect to specialized areas having particularized needs and warranting distinctive treatment." *Id.*, 407–408.

Appellants cite this language to support their proposition that a bankruptcy court created by Congress under its Art. I powers is constitutional, because the law of bankruptcy is a "specialized area," and Congress has found a "particularized need" that warrants "distinctive treatment." Brief for the United States 20–33.

Appellants' contention, in essence, is that pursuant to any of its Art. I powers, Congress may create courts free of Art. III's requirements whenever it finds that course expedient. This contention has been rejected in previous cases. See, *e. g.*, *Atlas Roofing Co.* v. *Occupational Safety Comm'n*, *supra*, at 450, n. 7; *Toth* v. *Quarles*, 350 U. S. 11 (1955). Although the cases relied upon by appellants demonstrate that independent courts are not required for *all* federal adjudications, those cases also make it clear that where Art. III does apply, all of the legislative powers specified in Art. I and elsewhere are subject to it. See, *e. g.*, *Ex parte Bakelite Corp.*, 279 U. S., at 449; *Toth* v. *Quarles*, *supra*; *American Ins. Co.* v. *Canter*, 1 Pet., at 546; *Murray's Lessee*, 18 How., at 284. Cf. *Crowell* v. *Benson*, *supra*, at 51.

The flaw in appellants' analysis is that it provides no limiting principle. It thus threatens to supplant completely our system of adjudication in independent Art. III tribunals and replace it with a system of "specialized" legislative courts. True, appellants argue that under their analysis Congress could create legislative courts pursuant only to some "specific" Art. I power, and "only when there is a particularized need for distinctive treatment." Brief for the United States 22–23. They therefore assert, that their analysis would not permit Congress to replace the independent Art. III judiciary through a "wholesale assignment of federal judicial business to legislative courts." *Ibid.* But these "limitations" are wholly illusory. For example, Art. I, § 8, empowers Congress to enact laws, *inter alia*, regulating interstate commerce and punishing certain crimes. Art. I, § 8, cls. 3, 6. On appellants' reasoning Congress could provide for the adjudication of these and "related" matters by judges and courts within Congress' exclusive control.[27] The potential for encroachment upon powers reserved to the Judicial Branch through the device of "specialized" legislative courts is dramatically evidenced in the jurisdiction granted to the courts created by the Act before us. The broad range of questions that can be brought into a bankruptcy court because they are "related to cases under title 11," 28 U. S. C. § 1471(b) (1976 ed., Supp. III), see *supra*, at 3, is the clearest proof that even when Congress acts through a "specialized" court, and pursuant to only one of its many Art. I powers, appellants' analysis fails to provide any real protection against the erosion of Art. III jurisdiction by the unilateral action of the political branches. In short, to accept appellants' reasoning, would require that we replace the principles delineated in our precedents, rooted in history and the Constitution, with a rule of broad legislative discretion that could effectively eviscerate the constitutional guarantee of an independent Judicial Branch of the Federal Government.[28]

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[27] Nor can appellants' analysis logically be limited to Congress' Art. I powers. For example, appellants' reasoning relies in part upon analogy to our approval of territorial courts in *American Ins. Co.* v. *Canter*, 1 Pet. 511 (1828), and of the use of an administrative agency in *Crowell* v. *Benson*, 285 U. S. 22 (1932). Brief for the United States 15; Brief for Northern Pipeline Construction Co. 10. In those cases the Court recognized the right of Congress to create territorial courts pursuant to the authority granted under Art. IV, § 3, cl. 2 and to create administrative tribunals to adjudicate rights in admiralty pursuant to the federal authority in Art. III § 2 over admiralty jurisdiction. See *American Ins. Co.* v. *Canter*, *supra*, at 546; *Crowell* v. *Benson*, *supra*, at 39. This reliance underscores the fact that appellants offer no principled means of distinguishing between Congress' Art. I powers and any of Congress' other powers—including, for example, those conferred by the various amendments to the Constitution, *e. g.*, U. S. Const. Amdt. XIII, XIV, XV, XVI, XIX, XXIII, XXIV, XXVI.

Appellants' reliance upon *Palmore* for such broad legislative discretion is misplaced. In the context of the issue decided in that case, the language quoted from the *Palmore*

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[28] JUSTICE WHITE'S suggested "limitations" on Congress' power to create Art. I courts are even more transparent. JUSTICE WHITE'S dissent suggests that Art. III "should be read as expressing one value that must be balanced against competing constitutional concerns and legislative responsibilities," and that the Court retains the final word on how the balance is to be struck. *Post*, at 22–23. The dissent would find the Art. III "value" accommodated where appellate review to Art. III courts is provided and where the Art. I courts are "designed to deal with issues likely to be of little interest to the political branches." *Post*, at 24–25. But the dissent's view that appellate review is sufficent to satisfy either the command or the purpose of Art. III is incorrect. See n. 39, *infra*. And the suggestion that we should consider whether the Art. I courts are designed to deal with issues likely to be of interest to the political branches would undermine the validity of the adjudications performed by most of the administrative agencies, on which validity the dissent so heavily relies.

In applying its ad hoc balancing approach to the facts of this case, the dissent rests on the justification that these courts differ from standard Art. III courts because of their "extreme specialization." As noted above, "extreme specialization" is hardly an accurate description of bankruptcy courts designed to adjudicate the entire range of federal and state controversies. See *infra*, at 34–35. Moreover, the special nature of bankruptcy adjudications is in no sense incompatible with performance of such functions in a tribunal afforded the protection of Art. III. As one witness pointed out to Congress:

"Relevant to that question of need, it seems worth noting that Article III itself permits much flexibility; so long as tenure during good behavior is granted, much room exists as regards other conditions. Thus it would certainly be possible to create a special bankruptcy court under Article III and there is no reason why the judges of that court would have to be paid the same salary as district judges or any other existing judges. It would also be permissible to provide that when a judge of that court retired pursuant to statute, a vacancy for new appointment would not automatically be creopinion, *supra*, at 21, offers no substantial support for appellants' argument. *Palmore* was concerned with the courts of the District of Columbia, a unique federal enclave over which "Congress has . . . entire control . . . for every purpose of government." *Kendall* v. *United States*, 12 Pet. 524, 619 (1838). The "plenary authority" under the District of Columbia clause, Art. I, § 8 cl. 17, was the subject of the quoted passage and the powers granted under that clause are obviously different in kind from the other broad powers conferred on Congress: Congress' power over the District of Columbia encompasses the *full* authority of government, and thus, necessarily, the executive and judicial powers as well as the legislative. This is a power that is clearly possessed by Congress only in limited geographic areas. *Palmore* itself makes this limitation clear. The quoted passage distinguishes the congressional powers at issue in *Palmore* from those in which the Art. III command of an independent Judiciary must be honored: where "laws of national applicability and affairs of national concern are at stake." 411 U. S., at 408. Laws respecting bankruptcy, like most laws enacted pursuant to the national powers catalogued in Art. I, § 8, are clearly laws of national applicability and affairs of national concern. Thus our reference in *Palmore* to "specialized areas having particularized needs" referrred only to *geographic* areas, such as the District of Columbia or territories outside the States of the Federal Union. In light of the clear commands of Art. III, nothing held or said in *Palmore* can be taken to mean that in every area in which Congress may legislate, it may also create non-Art. III courts with Art. III powers.

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ated. And it would be entirely valid to specify that the judges of that court could not be assigned to sit, even temporarily, on the general district courts or courts of appeals." Hearings on H.R. 31 and H.R. 32 before the Subcommittee on Civil and Constitutional Rights of the House Committee on the Judiciary, 94th Cong., 2d Sess., 2697 (letter of Paul Mishkin).

In sum, Art. III bars Congress from establishing legislative courts to exercise jurisdiction over all matters related to those arising under the bankruptcy laws. The establishment of such courts does not fall within any of the historically recognized situations in which the general principle of independent adjudication commanded by Art. III does not apply. Nor can we discern any persuasive reason, in logic, history, or the Constitution, why the bankruptcy courts here established lie beyond the reach of Art. III.

IV

Appellants advance a second argument for upholding the constitutionality of the Act: that "viewed within the entire judicial framework set up by Congress," the bankruptcy court is merely an "adjunct" to the district court, and that the delegation of certain adjudicative functions to the bankruptcy court is accordingly consistent with the principle that the judicial power of the United States must be vested in Art. III courts. See Brief for the United States 11–13, 37–45. As support for their argument, appellants rely principally upon *Crowell* v. *Benson*, *supra*, and *United States* v. *Raddatz*, 447 U. S. 667 (1980), cases in which we approved the use of administrative agencies and magistrates as adjuncts to Art. III courts. Brief for the United States at 40–42. The question to which we turn, therefore, is whether the Act has retained "the essential attributes of the judicial power," *Crowell* v. *Benson*, *supra*, at 51, in Art. III tribunals.[29]

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[29] JUSTICE WHITE'S dissent fails to distinguish between Congress' power to create adjuncts to Art. III courts, and Congress' power to create Art. I courts in limited circumstances. See *Post*, at 12–13. Congress' power to create adjuncts and assign them limited adjudicatory functions is in no sense an "exception" to Art. III. Rather, such an assignment is consistent with Art. III, so long as "the essential attributes of judicial power" are retained in the Art. III court, *Crowell* v. *Benson*, 285 U. S., at 51, and so long as Congress' adjustment of the traditional manner of adjudication can be sufficiently linked to its legislative power to define substantive rights,

The essential premise underlying appellants' argument is that even where the Constitution denies Congress the power to establish legislative courts, Congress possesses the authority to assign certain factfinding functions to adjunct tribunals. It is, of course, true that while the the power to adjudicate "private rights" must be vested in an Art. III court, see Part III, *supra*,

> "this Court has accepted factfinding by an administrative agency, . . . as an adjunct to the Art. III court, analogizing the agency to a jury or a special master and permitting it in admiralty cases to perform the function of a special master. *Crowell* v. *Benson*, 285 U. S. 22, 51–65 (1932)." *Atlas Roofing Co.* v. *Occupational Safety Comm'n*, 430 U. S. 442, 450, n. 7 (1977).

The use of administrative agencies as adjuncts was first upheld in *Crowell* v. *Benson*, *supra*. The congressional scheme challenged in *Crowell* empowered an administrative agency, the United States Employees' Compensation Commission, to make initial factual determinations pursuant to a federal statute requiring employers to compensate their employees for work-related injuries occurring upon the navigable waters of the United States. The Court began its analysis by noting that the federal statute administered by the Compensation Commission provided for compensation of injured employees "irrespective of fault," and that the statute also prescribed a fixed and mandatory schedule of compensation. *Id.*, at 38. The agency was thus left with the limited role of determining "questions of fact as to the circumstances, nature, extent and consequences of the injuries sustained by the employee for which compensation is to be made." *Id.*, at 54. The agency did not possess the power to enforce any of its compensation orders: On the contrary, every compensa-

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see *infra*, at 32–33. Cf. *Atlas Roofing Co.* v. *Occupational Safety Comm'n.*, 430 U. S., at 450, n. 7.

tion order was appealable to the appropriate federal district court, which had the sole power to enforce it or set it aside, depending upon whether the court determined it to be "in accordance with law" and supported by evidence in the record. *Id.*, at 44–45, 48. The Court found that in view of these limitations upon the Compensation Commission's functions and powers, its determinations were "closely analogous to findings of the amount of damages that are made, according to familiar practice, by commissioners or assessors." *Id.*, at 54. Observing that "there is no requirement that, in order to maintain the essential attributes of the judicial power, all determinations of fact in constitutional courts shall be made by judges," *id.*, at 51, the Court held that Art. III imposed no bar to the scheme enacted by Congress, *id.*, at 54.

Crowell involved the adjudication of congressionally created rights. But this Court has sustained the use of adjunct fact-finders even in the adjudication of constitutional rights—so long as those adjuncts were subject to sufficient control by an Art. III district court. In *United States* v. *Raddatz*, *supra*, the Court upheld the 1978 Federal Magistrates Act, which permitted district court judges to refer certain pretrial motions, including suppression motions based on alleged violations of constitutional rights, to a magistrate for initial determination. The Court observed that the magistrate's proposed findings and recommendations were subject to *de novo* review by the district court, which was free to rehear the evidence or to call for additional evidence. *Id.*, at 676–677, 681–683. Moreover, it was noted that the magistrate considered motions only upon reference from the district court, and that the magistrates were appointed, and subject to removal, by the district court. *Id.*, at 685 (BLACKMUN, J., concurring).[30] In short, the ultimate decisionmaking authority respecting all pretrial motions clearly remained with the district court. *Id.*, at 682. Under these circumstances, the Court held that the Act did not violate the constraints of Art. III. *Id.*, at 683–684.[31]

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[30] Thus in *Raddatz* there was no serious threat that the exercise of the judicial power would be subject to incursion by other branches. "The only conceivable danger of a 'threat' to the 'independence' of the magistrate

Together these cases establish two principles that aid us in determining the extent to which Congress may constitutionally vest traditionally judicial functions in non-Art. III offi-

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comes from within, rather than without the judicial department". 447 U. S., at 685. (BLACKMUN, J., concurring).

[31] Appellants and JUSTICE WHITE'S dissent also rely on the broad powers exercised by the bankruptcy referees immediately before the Bankruptcy Act of 1978. See *post*, at 4–12. But those particular adjunct functions, which represent the culmination of years of gradual expansion of the power and authority of the bankruptcy referee, see 1 Collier on Bankruptcy ¶ 1.02 (15th ed. 1981), have never been explicitly endorsed by this Court. In *Katchen* v. *Landy*, 382 U. S. 323 (1966), on which the dissent relies, there was no discussion of the Art. III issue. Moreover, when *Katchen* was decided the 1973 Bankruptcy Rules had not yet been adopted, and the District Judge, after hearing the report of magistrate, was free to "modify it or . . . reject it in whole or in part or . . . receive further evidence or . . . recommit it with instructions." Gen. Order in Bankruptcy No. 47, 305 U. S. 679 (1935).

We note, moreover, that the 1978 Act made at least three significant changes from the bankruptcy practice that immediately preceded it. First, of course, the jurisdiction of the bankruptcy courts was "substantially expanded by the Act." H.R. Rep. No. 95–595, *supra*, p. 13 (1977). Before the Act the referee had no jurisdiction, except with consent, over controversies beyond those involving property in the actual or constructive possession of the court. 11 U. S.C. § 46(b) (repealed). See *MacDonald* v. *Plymouth Trust Co.*, 296 U. S. 263, 266 (1932). It cannot be doubted that the new bankruptcy judges, unlike the referees, have jurisdiction far beyond that which can be even arguably characterized as merely incidental to the discharge in bankruptcy or a plan for reorganization. Second, the bankruptcy judges have broader powers than those exercised by the referees. See *infra* at 34–35; H.R. Rep. 95–595, *supra*, p. 12 and nn. 63–68. Finally, and perhaps most significantly, the relationship between the district court and the bankruptcy court was changed under the 1978 Act. Before the Act, bankruptcy referees were "subordinate adjuncts of the district courts." *Id.*, at 7. In contrast, the new bankruptcy courts are "independent of the United States district courts." *Ibid.*; Collier on Bankcers. First, it is clear that when Congress creates a substantive federal right, it possesses substantial discretion to prescribe the manner in which that right may be adjudicated—including the assignment to an adjunct of some functions historically performed by judges.[33] Thus *Crowell* recognized that Art. III does not require "all determinations of fact [to] be made by judges," 285 U. S., at 51; with respect to congressionally created rights, some factual determinations may be made by a specialized factfinding tribunal designed by Congress, without constitutional bar, *id.*, at 54. Second, the functions of the adjunct must be limited in such a way that "the essential attributes" of judicial power are retained in the Art. III court. Thus in upholding the adjunct scheme challenged in *Crowell*, the Court emphasized that "the reservation of full authority to the court to deal with matters of law provides for the appropriate exercise of the judicial function in this class of cases." *Ibid.* And in refusing to invalidate the Magistrates Act at issue in *Raddatz*, the Court

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ruptcy, ¶ 1.03, at 1–9 (15th ed. 1981). Before the Act, bankruptcy referees were appointed and removable only by the district court. 11 U. S.C. § 62 (repealed). And the district court retained control over the reference by his power to withdraw the case from the referee. Bkrptcy. Rule 102. Thus even at the trial stage, the parties had access to an independent judicial officer. Although Congress could still lower the salary of referees, they were not dependent on the political branches of government for their appointment. To paraphrase JUSTICE BLACKMUN's observation in *Raddatz*, *supra*, the primary "danger of a 'threat' to the independence of the [adjunct came] from within, rather than without the judicial department." 447 U. S., at 685 (concurring opinion).

[33] Contrary to JUSTICE WHITE's suggestion, we do not concede that "Congress may provide for initial adjudications by Article I courts or administrative judges of all rights and duties arising under otherwise valid federal laws." See *post*, at 3. Rather we simply reaffirm the holding of *Crowell*—that Congress may assign to non-Art. III bodies some adjudicatory functions. *Crowell* itself spoke of "specialized" functions. This case does not require us to specify further any limitations that may exist with respect to Congress' power to create adjuncts to assist in the adjudication of federal statutory rights.

stressed that under the congressional scheme "'[t]he authority—and the responsibility—to make an informed, final determination . . . remains with the judge,'" 447 U. S., at 682, quoting *Mathews* v. *Weber*, 423 U. S. 261, 271 (1976); the statute's delegation of power was therefore permissible, since "the ultimate decision is made by the district court," 447 U. S., at 683.

These two principles assist us in evaluating the "adjunct" scheme presented in this case. Appellants assume that Congress' power to create "adjuncts" to consider all cases related to those arising under title 11 is as great as it was in the circumstances of *Crowell*. But while *Crowell* certainly endorsed the proposition that Congress possesses broad discretion to assign factfinding functions to an adjunct created to aid in the adjudication of congressionally created statutory rights, *Crowell* does not support the further proposition necessary to appellants' argument—that Congress possesses the same degree of discretion in assigning traditionally judicial power to adjuncts engaged in the adjudication of rights *not* created by Congress. Indeed, the validity of this proposition was expressly denied in *Crowell*, when the Court rejected "the untenable assumption that the constitutional courts may be deprived in all cases of the determination of facts upon evidence even though a *constitutional* right may be involved," 285 U. S., at 60–61 (emphasis added),[33] and stated that

"the essential independence of the exercise of judicial

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[33] The Court in *Crowell* found that the requirement of *de novo* review as to certain facts was not "simply the question of due process in relation to notice and hearing," but was "rather a question of the appropriate balance of Federal judicial power." 285 U. S., at 56. The dissent agreed that some factual findings cannot be made by adjuncts, on the ground that "under certain circumstances, the constitutional requirement of due process is a requirement of [Art. III] judicial process." *Id.*, at 87 (Brandeis, J., dissenting).

> power of the United States in the enforcement of *constitutional* rights requires that the Federal court should determine . . . an issue [of agency jurisdiction] upon its own record and the facts elicited before it." *Id.*, at 64 (emphasis added).[34]

Appellants' proposition was also implicitly rejected in *Raddatz.* Congress' assignment of adjunct functions under the Federal Magistrates Act was substantially narrower than under the statute challenged in *Crowell.* Yet the Court's scrutiny of the adjunct scheme in *Raddatz*—which played a role in the adjudication of *constitutional* rights—was far stricter than it had been in *Crowell.* Critical to the Court's decision to uphold the Magistrates Act was the fact that the ultimate decision was made by the district court. 447 U. S., at 683.

Although *Crowell* and *Raddatz* do not explicitly distinguish between rights created by Congress and other rights, such a distinction underlies in part *Crowell*'s and *Raddatz*'s recognition of a critical difference between rights created by federal statute and rights recognized by the Constitution. Moreover, such a distinction seems to us to be necessary in light of the delicate accommodations required by the principle of separation of powers reflected in Art. III. The constitutional system of checks and balances is designed to guard against "encroachment or aggrandizement" by Congress at the expense of the other branches of government. *Buckley* v. *Valeo*, 424 U. S., at 122. But when Congress creates a statutory right, it clearly has the discretion, in defining that right, to create presumptions, or assign burdens of proof, or prescribe remedies; it may also provide that persons seeking to vindicate that right must do so before particularized tribunals created to perform the specialized adjudicative tasks related to that right.[35] Such provisions do, in a sense, affect the exercise of judicial power, but they are also incidental to Congress' power to define the right that it has created. No comparable justification exists, however, when the right being adjudicated is not of congressional creation. In such a situation, substantial inroads into functions that have traditionally been performed by the judiciary cannot be characterized merely as incidental extensions of Congress' power to define rights that it has created. Rather, such inroads suggest unwarranted encroachments upon the judicial power of the United States, which our Constitution reserves for Art. III courts.

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[34] *Crowell*'s precise holding, with respect to the review of "jurisdictional" and "constitutional" facts that arise within ordinary administrative proceedings, has been undermined by later cases. See *St. Joseph Stock Yards Co.* v. *United States*, 298 U. S. 38, 53 (1936). See generally 4 K. Davis, Administrative Law Treatise §§ 29.08, 29.09 (1st ed. 1958). But the general principle of *Crowell*—distinguishing between congressionally created rights and constitutionally recognized rights—remains valid, as evidenced by the Court's recent approval of *Ng Fung Ho* v. *White*, 259 U. S. 276 (1922), on which *Crowell* relied. See *Agosto* v. *INS*, 436 U. S. 748, 753 (1978) (*de novo* judicial determination required for claims of American citizenship in deportation proceedings). See also *United States* v. *Raddatz*, 447 U. S., at 682–684; *id.*, at 707–712 (MARSHALL, J., dissenting).

We hold that the Bankruptcy Act of 1978 carries the possibility of such an unwarranted encroachment. Many of the rights subject to adjudication by the Act's bankruptcy courts, like the rights implicated in *Raddatz*, are not of Congress' creation. Indeed, the case before us, which centers upon appellant Northern's claim for damages for breach of contract and misrepresentation, involves a right created by *state* law, a right independent of and antecedent to the reorganization petition that conferred jurisdiction upon the bankruptcy court.[36] Accordingly, Congress' authority to control the manner in which that right is adjudicated, through assignment of historically judicial functions to a non-Art. III "adjunct," plainly must be deemed at a minimum. Yet it is equally plain that Congress has vested the "adjunct" bankruptcy judges with powers over appellant's state-created right that far exceed the powers that it has vested in administrative agencies that adjudicate only rights of Congress' own creation.

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[35] Drawing the line between permissable extensions of legislative power and impermissible incursions into judicial power is a delicate undertaking, for the powers of the Judicial and Legislative Branches are often overlapping. As Justice Frankfurter noted in a similar context, "To be sure the content of the three authorities of government is not to be derived from an abstract analysis. The areas are partly interacting, not wholly disjointed." *Youngstown Co.* v. *Sawyer*, 343 U. S. 579, 610 (1952) (concurring opinion). The interaction between the Legislative and Judicial Branches is at its height where courts are adjudicating rights wholly of Congress' creation. Thus where Congress creates a substantive right, pursuant to one of its broad powers to make laws, Congress may have something to say about the proper manner of adjudicating that right.

Unlike the administrative scheme that we reviewed in *Crowell*, the Act vests all "essential attributes" of the judicial power of the United States in the "adjunct" bankruptcy court. First, the agency in *Crowell* made only specialized, narrowly confined factual determinations regarding a particularized area of law. In contrast, the subject matter jurisdiction of the bankruptcy courts encompasses not only traditional matters of bankruptcy, but also "all civil proceedings arising under title 11 or arising in or *related to* cases arising under title 11." 28 U. S. C. § 1471(b) (1976 ed., Supp. III) (emphasis added). Second, while the agency in *Crowell* engaged in statutorily channeled factfinding functions, the bankruptcy courts exercise "*all* of the jurisdiction" conferred by the Act on the district courts, § 1471(b) (emphasis added).

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[36] Of course, bankruptcy adjudications themselves, as well as the manner in which the rights of debtors and creditors are adjusted, are matters of federal law. Appellant Northern's state-law contract claim is now in federal court because of its relationship to appellant's reorganization petition. See n. 26, *supra*. But Congress has not purported to prescribe a rule of decision for the resolution of appellant's contractual claims.

Third, the agency in *Crowell* possessed only a limited power to issue compensation orders pursuant to specialized procedures, and its orders could be enforced only by order of the district court. By contrast, the bankruptcy courts exercise all ordinary powers of district courts, including the power to preside over jury trials, 28 U. S. C. § 1480 (1976 ed., Supp. III), the power to issue declaratory judgments, § 2201, the power to issue writs of habeas corpus, § 2256, and the power to issue any order, process or judgment appropriate for the enforcement of the provisions of title 11, 11 U. S. C. § 105(a) (1976 ed., Supp. III).[37] Fourth, while orders issued by the agency in *Crowell* were to be set aside if "not supported by the evidence," the judgments of the bankruptcy courts are apparently subject to review only under the more deferential "clearly erroneous" standard. See n. 5, *supra*. Finally, the agency in *Crowell* was required by law to seek enforcement of its compensation orders in the district court. In contrast, the bankruptcy courts issue final judgments, which are binding and enforceable even in the absence of an appeal.[38] In short, the "adjunct" bankruptcy courts created by the Act exercise jurisdiction behind the facade of a grant to the district courts, and are exercising powers far greater than those lodged in the adjuncts approved in either *Crowell* or *Raddatz*.[39]

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[37] The limitations that the judges "may not enjoin another court or punish a criminal contempt not committed in the presence of the judge of the court or warranting a punishment of imprisonment," 28 U. S. C. § 1481 (1976 ed., Supp. III), are also denied to Art. III judges under certain circumstances. See 18 U. S. C. §§ 401, 402, 3691; 28 U. S. C. § 2283.

[38] Although the entry of an enforcement order is in some respects merely formal, it has long been recognized that

"'The award of execution . . . is a part, and an essential part of every judgment passed by a court exercising judicial power. It is no judgment in the legal sense of the term, without it.'" *ICC* v. *Brimson*, 154 U. S. 447, 484 (1894), quoting Chief Justice Taney's memorandum in *Gordon* v. *United States*, 117 U. S. 697, 702 (1864).

[39] Appellants suggest that *Crowell* and *Raddatz* stand for the proposition

We conclude that § 241(a) of the Bankruptcy Act of 1978 has impermissibly removed most, if not all, of "the essential attributes of the judicial power" from the Art. III district court, and has vested those attributes in a non-Art. III adjunct. Such a grant of jurisdiction cannot be sustained as an

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that Art. III is satisfied so long as some degree of appellate review is provided. But that suggestion is directly contrary to the text of our Constitution: "The Judges, *both* of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall . . . receive [undiminished] Compensation." Art. III, § 1 (emphasis added). Our precedents make it clear that the constitutional requirements for the exercise of the judicial power must be met at all stages of adjudication, and not only on appeal, where the court is restricted to considerations of law, as well as the nature of the case as it has been shaped at the trial level. The Court responded to a similar suggestion in *Crowell* by stating that to accept such a regime,

"would be to sap the judicial power as it exists under the Federal Constitution, and to establish a government of bureaucratic character alien to our system, wherever fundamental rights depend, as not infrequently they do depend, upon the facts, and finality as to facts becomes in effect finality in law." 285 U. S., at 57.

Cf. *Ward* v. *Village of Monroeville*, 409 U. S. 57, 61-62 (1972); *Osborn* v. *Bank of the United States*, 9 Wheat. 738, 883 (1824).

JUSTICE WHITE'S dissent views the function of the Third Branch as interpreting the Constitution in order to keep the other two branches in check, and would accordingly find the purpose, if not the language, of Art. III satisfied where there is an appeal to an Art. III court. See *post*, at 24. But in the Framers' view, Art. III courts would do a great deal more than, in an abstract way, announce guidelines for the other two branches. While "expounding" the Constitution was surely one vital function of the Art. III courts in the Framers' view, the tasks of those courts, for which independence was an important safeguard, included the mundane as well as the glamorous, matters of common law and statute as well as constitutional law, issues of fact as well as issues of law. As Hamilton noted, "it is not with a view to infractions of the Constitution only, that the independence of the judges may be an essential safeguard against the effects of occasional ill humors in the society." The Federalist No. 78, p. 488 (H. Lodge ed. 1888). In order to promote the independence and improve the quality of federal judicial decision making in all of these areas, the Framers created a system of independent federal courts. See The Federalist Nos. 78-82.

exercise of Congress' power to create adjuncts to Art. III courts.

V

Having concluded that the broad grant of jurisdiction to the bankruptcy courts contained in § 241(a) is unconstitutional, we must now determine whether our holding should be applied retroactively to the effective date of the Act.[40] Our decision in *Chevron Oil Co.* v. *Huson*, 404 U. S. 97 (1971), sets forth the three considerations recognized by our precedents as properly bearing upon the issue of retroactivity. They are, first, whether the holding in question "decid[ed] an issue of first impression whose resolution was not clearly foreshadowed" by earlier cases, *id.*, at 106; second, "whether retrospective operation will further or retard [the] operation" of the holding in question, *id.*, at 107; and third, whether retroactive application "could produce substantial inequitable results" in individual cases, *ibid.* In the present case, all of these considerations militate against the retroactive application of our holding today. It is plain that Congress' broad grant of judicial power to non-Art. III bankruptcy judges presents an unprecedented question of interpretation of Art. III. It is equally plain that retroactive application would not further the operation of our holding, and would surely visit substantial injustice and hardship upon those litigants who relied upon the Act's vesting of jurisdiction in the bankruptcy courts. We hold, therefore, that our decision today shall apply only prospectively.[41]

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[40] It is clear that, at the least, the new bankruptcy judges cannot constitutionally be vested with jurisdiction to decide this state-law contract claim against Marathon. As part of a comprehensive restructuring of the bankruptcy laws, Congress has vested jurisdiction over this and all matters related to cases under title 11 in a single non-Art III court, and has done so pursuant to a single statutory grant of jurisdiction. In these circumstances we cannot conclude that if Congress were aware that the grant of jurisdiction could not constitutionally encompass this and similar claims, it would simply remove the jurisdiction of the bankruptcy court over these matters, leaving the jurisdictional provision and adjudicatory structure intact with respect to other types of claims, and thus subject to Art. III constitutional challenge on a claim-by-claim basis. Indeed, we note that one of the express purposes of the Act was to ensure adjudication of all claims in a single forum and to avoid the delay and expense of jurisdictional disputes. See H.R. Rep. No. 95-595, *supra*, p. 43-48; S. Rep. No. 95-989, p. 17 (1978). Nor can we assume, as THE CHIEF JUSTICE suggests, *post*, at 2, that Congress' choice would be to have this case "routed to the United States district court of which the bankruptcy court is an adjunct." We think that it is for Congress to determine the proper manner of restructuring the Bankruptcy Act of 1978 to conform to the requirements of Art. III, in the way that will best effectuate the legislative purpose.

The judgment of the District Court is affirmed. However, we stay our judgment until October 4, 1982. This limited stay will afford Congress an opportunity to reconstitute the bankruptcy courts or to adopt other valid means of adjudication, without impairing the interim administration of the bankruptcy laws. See *Buckley* v. *Valeo*, 424 U. S. 1, 143 (1976); cf. *Georgia* v. *United States*, 411 U. S. 526, 541 (1973); *Fortson* v. *Morris*, 385 U. S. 231, 235 (1966); *Maryland Comm.* v. *Tawes*, 377 U. S. 656, 675–676 (1964).

It is so ordered.

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[41] See also *Buckley* v. *Valeo*, 424 U. S., at 142; *Chicot County Drainage Dist.* v. *Bank*, 308 U. S. 371, 376–377 (1940); *Insurance Corp.* v. *Compagnie des Bauxites*, —— U. S. ——, ——, n. 9 (1982).

SUPREME COURT OF THE UNITED STATES

Nos. 81-150 AND 81-546

NORTHERN PIPELINE CONSTRUCTION CO.,
APPELLANT
81-150 *v.*
MARATHON PIPE LINE COMPANY AND
UNITED STATES

UNITED STATES, APPELLANT
81-546 *v.*
MARATHON PIPE LINE CO. ET AL.

ON APPEALS FROM THE UNITED STATES DISTRICT COURT FOR
THE DISTRICT OF MINNESOTA

[June 28, 1982]

JUSTICE REHNQUIST, with whom JUSTICE O'CONNOR joins, concurring in the judgment.

Were I to agree with the plurality that the question presented by this case is "whether the assignment by Congress to bankruptcy judges of the jurisdiction granted in § 241(a) of the Bankruptcy Act of 1978 . . . violates Art. III of the Constitution," *ante*, at 1, I would with considerable reluctance embark on the duty of deciding this broad question. But appellee Marathon Pipe Line Co. has not been subjected to the full range of authority granted Bankruptcy Courts by § 241(a). It was named as a defendant in a suit brought by appellant in a United States Bankruptcy Court. The suit sought damages for, *inter alia*, breaches of contract and warranty. Marathon moved to dismiss the action on the grounds that the Bankruptcy Act of 1978, which authorized the suit, violated Art. III of the Constitution insofar as it established Bankruptcy Judges whose tenure and salary protection do not conform to the requirements of Art. III.

With the case in this posture, Marathon has simply been named defendant in a lawsuit about a contract, a lawsuit initiated by appellant Northern after having previously filed a petition for reorganization under the Bankruptcy Act. Marathon may object to proceeding further with this lawsuit on the grounds that if it is to be resolved by an agency of the United States, it may be resolved only by an agency which exercises "the judicial power of the United States" described by Art. III of the Constitution. But resolution of any objections it may make on this ground to the exercise of a different authority conferred on Bankruptcy Courts by the 1978 Act, see *ante*, at 2–4, should await the exercise of such authority.

> "This Court, as is the case with all federal courts, 'has no jurisdiction to pronounce any statute, either of a State or of the United States, void, because irreconcilable with the Constitution, except as it is called upon to adjudge the legal rights of litigants in actual controversies. In the exercise of that jurisdiction, it is bound by two rules, to which it has rigidly adhered, one, never to anticipate a question of constitutional law in advance of the necessity of deciding it; the other never to formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied.' *Liverpool, New York & Philadelphia S.S. Co.* v. *Commissioners of Emmigration*, 113 U. S. 33. 39." *United States* v. *Raines*, 362 U. S. 17, 21 (1960).

Particularly in an area of constitutional law such as that of "Art. III Courts," with its frequently arcane distinctions and confusing precedents, rigorous adherence to the principle that this Court should decide no more of a constitutional question than is absolutely necessary accords with both our decided cases and with sound judicial policy.

From the record before us, the lawsuit in which Marathon was named defendant seeks damages for breach of contract, misrepresentation, and other counts which are the stuff of the traditional actions at common law tried by the courts at Westminster in 1789. There is apparently no federal rule of decision provided for any of the issues in the lawsuit; the claims of Northern arise entirely under state law. No method of adjudication is hinted, other than the traditional common law mode of judge and jury. The lawsuit is before the Bankruptcy Court only because the plaintiff has previously filed a petition for reorganization in that Court.

The cases dealing with the authority of Congress to create courts other than by use of its power under Art. III do not admit of easy synthesis. In the interval of nearly 150 years between *American Insurance Co.* v. *Canter*, 1 Pet. 511 (1828), and *Palmore* v. *United States*, 411 U. S. 389 (1973), the Court addressed the question infrequently. I need not decide whether these cases in fact support a general proposition and three tidy exceptions, as the plurality believes, or whether instead they are but landmarks on a judicial "darkling plain" where ignorant armies have clashed by night, as JUSTICE WHITE apparently believes them to be. None of the cases has gone so far as to sanction the type of adjudication to which Marathon will be subjected against its will under the provisions of the 1978 Act. To whatever extent different powers granted under that Act might be sustained under the "public rights" doctrine of *Murray's Lessee* v. *Hoboken Land & Improvement Co.*, 18 How. 272 (1855), and succeeding cases, I am satisfied that the adjudication of Northern's lawsuit cannot be so sustained.

I am likewise of the opinion that the extent of review by Art. III courts provided on appeal from a decision of the Bankruptcy Court in a case such as Northern's does not save the grant of authority to the latter under the rule espoused in *Crowell* v. *Benson*, 285 U. S. 22 (1932). All matters of fact and law in whatever domains of the law to which the parties' dispute may lead are to be resolved by the Bankruptcy Court in the first instance, with only traditional appellate review apparently contemplated by Art. III courts. Acting in this manner the Bankruptcy Court is not an "adjunct" of either the District Court or the Court of Appeals.

I would, therefore, hold so much of the Bankruptcy Act of 1978 as enables a Bankruptcy Court to entertain and decide Northern's lawsuit over Marathon's objection to be violative of Art. III of the United States Constitution. Because I agree with the plurality that this grant of authority is not readily severable from the remaining grant of authority to Bankruptcy Courts under § 241(a), see *ante*, at 37 n. 40, I concur in the judgment. I also agree with the discussion in Part V of the plurality opinion respecting retroactivity and the staying of the judgment of this Court.

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ON APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MINNESOTA

[June 28, 1982]

CHIEF JUSTICE BURGER, dissenting.

I join JUSTICE WHITE's dissenting opinion, but I write separately to emphasize that, notwithstanding the plurality opinion, the Court does *not* hold today that Congress' broad grant of jurisdiction to the new bankruptcy courts is generally inconsistent with Article III of the Constitution. Rather, the Court's holding is limited to the proposition stated by JUSTICE REHNQUIST in his concurrence in the judgment—that a "traditional" state common-law action, not made subject to a federal rule of decision, and related only peripherally to an adjudication of bankruptcy under federal law, must, absent the consent of the litigants, be heard by an "Article III court" if it is to be heard by any court or agency of the United States. This limited holding, of course, does not suggest that there is something inherently unconstitutional about the new bankruptcy courts; nor does it preclude such courts from adjudicating all but a relatively narrow category of claims "arising under" or "arising in or related to cases under" the Bankruptcy Act.

It will not be necessary for Congress, in order to meet the requirements of the Court's holding, to undertake a radical restructuring of the present system of bankruptcy adjudication. The problems arising from today's judgment can be resolved simply by providing that ancillary common-law actions, such as the one involved in this case, be routed to the United States district court of which the bankruptcy court is an adjunct.

SUPREME COURT OF THE UNITED STATES

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ON APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MINNESOTA

[June 28, 1982]

JUSTICE WHITE, with whom THE CHIEF JUSTICE and JUSTICE POWELL join, dissenting.

Article III, § 1 of the Constitution is straightforward and uncomplicated on its face:

> "The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behavior, and shall at stated Times, receive for their Services a Compensation, which shall not be diminished during their Continuance in Office."

Any reader could easily take this provision to mean that although Congress was free to establish such lower courts as it saw fit, any court that it did establish would be an "inferior" court exercising "judicial power of the United States" and so must be manned by judges possessing both life-tenure and a guaranteed minimal income. This would be an eminently sensible reading and one that, as the plurality shows, is well-founded in both the documentary sources and the political doctrine of separation of powers that stands behind much of our constitutional structure. *Ante*, at 6–9.

If this simple reading were correct and we were free to disregard 150 years of history, this would be an easy case and the plurality opinion could end with its observation that "[i]t is undisputed that the bankruptcy judges whose offices were created by the Bankruptcy Reform Act of 1978 do not enjoy the protections constitutionally afforded to Art. III judges." *Ante*, at 9. The fact that the plurality must go on to deal with what has been characterized as one of the most confusing and controversial areas of constitutional law[1] itself indicates the gross oversimplification implicit in the plurality's claim that "our Constitution unambiguously enunciates a fundamental principle—that the 'judicial Power of the United States' must be reposed in an independent Judiciary [and] provides clear institutional protections for that independence." *Ante*, at 9. While this is fine rhetoric, analytically it serves only to put a distracting and superficial gloss on a difficult question.

That question is what limits Article III places on Congress' ability to create adjucative institutions designed to carry out federal policy established pursuant to the substantive authority given Congress elsewhere in the Constitution. Whether fortunate or unfortunate, at this point in the history of constitutional law that question can no longer be answered by looking only to the constitutional text. This Court's cases construing that text must also be considered. In its attempt to pigeon-hole these cases, the plurality does violence to their meaning and creates an artificial structure that itself lacks coherence.

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[1] *Glidden Co.* v. *Zdanok*, 370 U. S. 530, 534 (1962) (Harlan, J., plurality opinion)

I

There are, I believe, two separate grounds for today's decision. First, non-Article III judges, regardless of whether they are labelled "adjuncts" to Article III courts or "Article I judges," may consider only controversies arising out of federal law. Because the immediate controversy in this case—Northern Pipeline's claim against Marathon—arises out of state law, it may only be adjudicated, within the federal system, by an Article III court.[2] Second, regardless of the source of law that governs the controversy, Congress is prohibited by Article III from establishing Article I courts, with three narrow exceptions. Adjudication of bankruptcy proceedings does not fall within any of these exceptions. I shall deal with the first of these contentions in this section.

The plurality concedes that Congress may provide for initial adjudications by Article I courts or administrative judges of all rights and duties arising under otherwise valid federal laws. *Ante*, at 30. There is no apparent reason why this principle should not extend to matters arising in federal bankruptcy proceedings. The Court attempts to escape the reach of prior decisions by contending that the bankrupt's claim against Marathon arose under state law. Non-Article III judges, in its view, cannot be vested with authority to adjudicate such issues. It then proceeds to strike down § 241(a) on this ground. For several reasons, the Court's judgment is unsupportable.

First, clearly this ground alone cannot support the Court's invalidation of § 241(a) on its face. The plurality concedes that in adjudications and discharges in bankruptcy, "the restructuring of debtor-creditor relations, which lies at the core of the federal bankruptcy power," *ante*, at 21, and "the manner in which the rights of debtors and creditors are adjusted," *ante*, at 34, n. 36, are matters of federal law. Under the plurality's own interpretation of the cases, therefore, these matters could be heard and decided by Article I judges. But because the bankruptcy judge is also given authority to hear a case like that of petitioner against Marathon, which the Court says is founded on state law, the Court holds that the section must be stricken down on its face. This is a grossly unwarranted emasculation of the scheme Congress has adopted. Even if the Court is correct that such a state law claim cannot be heard by a bankruptcy judge, there is no basis for doing more than declaring the section unconstitutional as applied to the claim against Marathon, leaving the section otherwise intact. In that event, cases such as this one would have to be heard by Article III judges or by state courts—unless the defendant consents to suit before the bankruptcy judge—just as they were before the 1978 Act was adopted. But this would remove from the jurisdiction of the bankruptcy judges only a tiny fraction of the cases he is now empowered to adjudicate and would not otherwise limit his jurisdiction.[3]

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[2] Because this is the sole ground relied upon by the concurring Justices, this is the effective basis for today's decision.

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[3] The plurality attempts to justify its sweeping invalidation of § 241(a), because of its inclusion of state-law claims, by suggesting that this statutory provision is nonseverable. *Ante*, at n. 40. The concurring Justices specifically adopt this argument as the reason for their decision to join the judgment of the Court. The basis for the conclusion of nonseverability, however, is nothing more than a presumption: "Congress has vested jurisdiction over this and all matters related to cases under title 11 in a single non-Art. III court, and has done so pursuant to a single statutory grant of jurisdiction. In these circumstances, we cannot conclude that if Congress were aware that the grant of jurisdiction could not constitutionally encompass this and similar claims, it would simply remove the jurisdiction of the bankruptcy court over these matters." *Ibid.* Although it is possible, as a historical matter, to find cases of this Court supporting this presumption, see *e. g.*, *Williams* v. *Standard Oil Co.*, 278 U. S. 235, 242 (1929), I had not thought this to be the contemporary approach to the problem of severability, particularly when dealing with federal statutes. I would follow

Second, the distinction between claims based on state law and those based on federal law disregards the real character of bankruptcy proceedings. The routine in ordinary bankruptcy cases now, as it was before 1978, is to stay actions against the bankrupt, collect the bankrupt's assets, require creditors to file claims or be forever barred, allow or disallow claims that are filed, adjudicate preferences and fraudulent transfers, and make pro rata distributions to creditors, who will be barred by the discharge from taking further actions against the bankrupt. The crucial point to be made is that in the ordinary bankrupcty proceeding the great bulk of creditor claims are claims that have accrued under state law prior to bankruptcy—claims for goods sold, wages, rent, utilities and the like. "[T]he word debt as used by the Act is not confined to the technical common law meaning but . . . extends to liabilities arising out of breach of contract . . . to torts . . . and to taxes owing to the United States or state or local governments." 1 Collier on Bankruptcy 88 (14th ed. 1976). Every such claim must be filed and its validity is subject to adjudication by the bankruptcy court. The existence and validity of such claims recurringly depends on state law. Hence, the bankruptcy judge is constantly enmeshed in state law issues.

The new aspect of the Bankruptcy Act of 1978, in this regard, therefore, is not the extension of federal jurisdiction to state law claims, but its extension to particular kinds of state law claims, such as contract cases against third parties or disputes involving property in the possession of a third person.[4]

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the approach taken by the Court in *Buckley* v. *Valeo*, 424 U. S. 1, 108 (1976): "Unless it is evident that the Legislature would not have enacted those provisions which are within its power, independently of that which is not, the invalid part may be dropped if what is left is fully operative as a law." Quoting *Champlin Refining Co.* v. *Corporation Commission*, 286 U. S. 210 (1932). This presumption seems particularly strong when Congress has already "enacted those provisions which are within its power, independently of that which is not"—*i. e.*, in the old Bankruptcy Act.

[4] Even this is not entirely new. Under the old Act, in certain circum-

Prior to 1978, a claim of a bankrupt against a third party, such as the claim against Marathon in this case, was not within the jurisdiction of the bankruptcy judge. The old limits were based, of course, on the restrictions implicit within the concept of *in rem* jurisdiction; the new extension is based on the concept of *in personam* jusisdiction. "The bankruptcy court is given in personam jurisdiction as well as in rem jurisdiction to handle everything that arises in a bankruptcy case." H.R. Rep. No. 595, 95th Cong., 1st Sess. 445 (1977). The difference between the new and old Act, therefore, is not to be found in a distinction between state law and federal law matters; rather, it is in a distinction between *in rem* and *in personam* jurisdiction. The majority at no place explains why this distinction should have constitutional implications.

Third, all that can be left of the majority's argument in this regard is that state law claims adjudicated within the federal system must be heard in the first instance by Article III judges. I shall argue below that any such attempt to distinguish Article I from Article III courts by the character of the controversies they may adjudicate fundamentally misunderstands the historical and constitutional significance of Article I courts. Initially, however, the majority's proposal seems to turn the separation of powers doctrine, upon which the majority relies, on its head: Since state law claims would ordinarily not be heard by Article III judges—*i. e.*, they would be heard by state judges—one would think that there is little danger of a diminution of, or intrusion upon, the power of Article III courts, when such claims are assigned to a non-Arti-

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stances, the referee could actually adjudicate and order the payment of a claim of the bankrupt estate against another. In *Katchen* v. *Landy*, 382 U. S. 323 (1966), for example, we recognized that when a creditor files a claim, the referee is empowered to hear and decide a counter-claim against that creditor arising out of the same transaction. A similar situation could arise in adjudicating setoffs under former § 68 of the Bankruptcy Act.

cle III court. The plurality misses this obvious point because it concentrates on explaining how it is that federally created rights can ever be adjudicated in Article I courts—a far more difficult problem under the separation of powers doctrine. The plurality fumbles when it assumes that the rationale it develops to deal with the latter problem must also govern the former problem. In fact, the two are simply unrelated and the majority never really explains the separation of powers problem that would be created by assigning state law questions to legislative courts or to adjuncts of Article III courts.

One need not contemplate the intricacies of the separation of powers doctrine, however, to realize that majority's position on adjudication of state law claims is based on an abstract theory that has little to do with the reality of bankruptcy proceedings. Even prior to the present Act, bankruptcy cases were generally referred to bankruptcy judges, previously called referees. Bankruptcy Rule 102(a). Section 66 of Title 11 described the jurisdiction of the referees. Their powers included the authority to

> "consider all petitions referred to them and make the adjudications or dismiss the petition . . . grant, deny or revoke discharges, determine the dischargeability of debts, and render judgments thereon [and] perform such of the duties as are by this Title conferred on courts of bankruptcy, including those incidental to ancillary jurisdiction, and as shall be prescribed by rules or orders of courts of bankruptcy of their respective districts, except as herein otherwise provided."

The bankruptcy judge possessed "complete jurisdiction of the proceedings." 1 Collier on Bankruptcy 65 (14th ed. 1976). The referee would initially hear and decide practically all matters arising in the proceedings, including the allowance and disallowance of the claims of creditors.[5] If a claim was disallowed by the bankruptcy judge and the decision was not reversed on appeal, the creditor was forever barred from further action against the bankrupt. As pointed out above, all of these matters could and usually did involve state law issues. Initial adjudication of state law issues by non-Article III judges is, then, hardly a new aspect of 1978 Act.

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[5] "The judicial act of allowance is one, of course, that is performed by

Furthermore, I take it that the Court does not condemn as inconsistent with Article III the assignment of these functions—*i. e.,* those within the summary jurisdiction of the old bankruptcy courts—to a non-Article III judge, since, as the plurality says, they lie at the core of the federal bankruptcy power. *Ante,* at 21. They also happen to be functions that have been performed by referees or bankruptcy judges for a very long time and without constitutional objection. Indeed, we approved the authority of the referee to allow or disallow claims in *Katchen* v. *Landy,* 382 U. S. 323 (1966). There, the referee held that a creditor had received a preference and that his claim could therefore not be allowed. We agreed that the referee had the authority not only to adjudicate the existence of the preference, but also to order that the preference be disgorged. We also recognized that the referee could adjudicate counterclaims against a creditor who files his claim against the estate. The 1973 Bankruptcy Rules make similar provision. See Rule 306(c), Rule 701, and Advisory Committee Note to Rule 701. Hence, if Marathon had filed a claim against the bankrupt in this case, the trustee could have filed and the bankruptcy judge could have adjudicated a counterclaim seeking the relief that is involved in this case.

Of course, all such adjudications by a bankruptcy judge or referee were subject to review in the District Court, on the record. See 11 U. S. C. § 67(c) (1976). Bankruptcy Rule 810, transmitted to Congress by this Court, provided that the District Court "shall accept the referee's findings of fact

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the referee where the proceedings have been generally referred." 3 Collier on Bankruptcy 229 n. 3 (14th ed. 1977).

unless they are clearly erroneous." As the plurality recognizes, *ante,* at 4, the 1978 Act provides for appellate review in Article III courts and presumably under the same "clearly erroneous standard." In other words, under both the old and new act, initial determinations of state law questions were to be made by non-Article III judges, subject to review by Article III judges. Why the differences in the provisions for appeal in the two Acts are of unconstitutional dimension remains entirely unclear.

In theory and fact, therefore, I can find no basis for that part of the majority's argument that rests on the state-law character of the claim involved here. Even if prior to 1978, the referee could not generally participate in cases aimed at collecting the assets of a bankrupt estate, he nevertheless repeatedly adjudicated issues controlled by state law. There is very little reason to strike down § 241(a) on its face on the ground that it extends, in a comparatively minimal way, the referees authority to deal with state law questions. To do so is to lose all sense of proportion.

II

The plurality unpersuasively attempts to bolster its case for facial invalidity by asserting that the bankruptcy courts are now "exercising powers far greater than those lodged in the adjuncts approved in either *Crowell* or *Raddatz.*" *Ante,* at 35. In support of this proposition it makes five arguments in addition to the "state-law" issue. Preliminarily, I see no basis for according standing to Marathon to raise any of these additional points. The state-law objection applies to the Marathon case. Only that objection should now be adjudicated.[4]

I also believe that the major premise of the plurality's argument is wholly unsupported: There is no explanation of why *Crowell* and *Raddatz* define the outer limits of constitutional authority. Much more relevant to today's decision are first, the practice in bankruptcy prior to 1978, which neither the majority nor any authoritative case has questioned, and second, the practice of today's administrative agencies. Considered from this perspective, all of the plurality's arguments are unsupportable abstractions, divorced from the realities of modern practice.

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[4] On this point I am in agreement with the concurring Justices.

The first three arguments offered by the plurality, *ante*, at 34–35, focus on the narrowly defined task and authority of the agency considered in *Crowell*: The agency made only "specialized, narrowly confined factual determinations" and could issue only a narrow class of orders. Regardless of whether this was true of the Compensation Board at issue in *Crowell*, it certainly was not true of the old bankruptcy courts, nor does it even vaguely resemble current administrative practice. As I have already said, general references to bankruptcy judges, which was the usual practice prior to 1978, permitted bankruptcy judges to perform almost all of the functions of a bankruptcy court. Referees or bankruptcy judges not only exercised summary jurisdiction but could also conduct adversary proceedings to:

> "(1) recover money or property . . . . (2) determine the validity, priority, or extent of a lien or other interest in property, (3) sell property free of a lien or other interest for which the holder can be compelled to make a money satisfaction, (4) object to or revoke a discharge, (5) obtain an injunction, (6) obtain relief from a stay . . . (7) determine the dischargeability of a debt." Bankruptcy Rule 701.

Although there were some exceptions to the referees authority, which have been removed by the 1978 Act, the additions to the jurisdiction of the bankruptcy judges were of marginal significance when examined in the light of the overall functions of those judges before and after 1978. In my view, those changes are not sufficient to work a qualitative change in the character of the bankruptcy judge.

The plurality's fourth argument fails to point to any difference between the new and old bankruptcy acts. While the administrative orders in *Crowell* may have been set aside by a court if "not supported by the evidence," under both the new and old acts at issue here, orders of the bankruptcy judge are reviewed under the "clearly erroneous standard." See Bankruptcy Rule 810. Indeed, judicial review of the orders of bankruptcy judges is more stringent than that of many modern administrative agencies. Generally courts are not free to set aside the findings of administrative agencies, if supported by substantial evidence. But more importantly, courts are also admonished to give substantial deference to the agency's interpretation of the statute it is enforcing. No such deference is required with respect to decisions on the law made by bankruptcy judges.

Finally, the plurality suggests that, unlike the agency considered in *Crowell*, the orders of a post-1978 bankruptcy judge are final and binding even though not appealed. *Ante*, at 35. To attribute any constitutional significance to this, unless the plurality intends to throw into question a large body of administrative law, is strange. More directly, this simply does not represent any change in bankruptcy practice. It was hornbook law prior to 1978 that the authorized judgments and orders of referees, including turnover orders, were final and binding and *res judicata* unless appealed and overturned:

> "The practice before the referee should not differ from that before the judge of the court of bankruptcy and, apart from direct review within the limitation of § 39(c), the orders of the referee are entitled to the same presumption of validity, conclusiveness and recognition in the court of bankruptcy or other courts." 1 Collier on Bankruptcy 65 (14th ed. 1976).

Even if there are specific powers now vested in bankruptcy judges that should be performed by Article III judges, the great bulk of their functions are unexceptionable and should be left intact. Whatever is invalid should be declared to be such; the rest of the 1978 Act should be left alone. I can account for the majority's inexplicably heavy hand in this case only by assuming that the Court has once again lost its conceptual bearings when confronted with the difficult problem of the nature and role of Article I courts. To that question I now turn.

III

A

The plurality contends that the precedents upholding Article I courts can be reduced to three categories. First, there are territorial courts, which need not satisfy Article III constraints because "the Framers intended that as to certain geographical areas . . . Congress was to exercise the general powers of government."[7] *Ante*, at 13. Second, there are courts martial, which are exempt from Article III limits because of a constitutional grant of power that has been "historically understood as giving the political branches of Government extraordinary control over the precise subject matter at issue." *Ante*, at 15. Finally, there are those legislative courts and administrative agencies that adjudicate cases involving public rights—controversies between the government and private parties—which are not covered by Article III because the controversy could have been resolved by the executive alone without judicial review. See *ante*, at 17. Despite the plurality's attempt to cabin the domain of Article I courts, it is quite unrealistic to consider these to be only three "narrow," *ante*, at 13, limitations on or exceptions to the reach of Article III. In fact, the plurality itself breaks the mold in its discussion of "adjuncts" in Part IV, when it announces that "when Congress creates a substantive federal right, it possesses substantial discretion to prescribe the manner in which that right may be adjudicated." *Ante*, at 30. Adjudications of federal rights may, according to the plurality, be committed to administrative agencies, as long as provision is made for judicial review.

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[7] The majority does not explain why the constitutional grant of power over the territories to Congress is sufficient to overcome the strictures of Article III, but presumably not sufficient to overcome the strictures of the Presentment Clause or other executive limits on congressional authority.

The first principle introduced by the plurality is geographical: Article I courts presumably are not permitted within the states.[8] The problem, of course, is that both of the other exceptions recognize that Article I courts can indeed operate within the States. The second category relies upon a new principle: Article I courts are permissible in areas in which the Constitution grants Congress "extraordinary control over the precise subject matter." *Ante*, at 15. Preliminarily, I do not know how we are to distinguish those areas in which Congress' control is "extraordinary" from those in which it is not. Congress' power over the armed forces is established in Art. I, §8, cls. 13, 14. There is nothing in those clauses that creates congressional authority different in kind from the authority granted to legislate with respect to bankruptcy. But more importantly, in its third category, and in its treatment of "adjuncts", the plurality itself recognizes that Congress can create Article I courts in virtually all the areas in which Congress is authorized to act, regardless of the quality of the constitutional grant of authority. At the same time, territorial courts or the courts of the District of Columbia, which are Article I courts, adjudicate private, just as much as public or federal, rights.

Instead of telling us what it is Article I courts can and cannot do, the plurality presents us with a list of Article I courts.

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[8] Had the plurality cited only the territorial courts, the principle relied on perhaps could have been the fact that power over the territories is provided Congress in Article IV. However, Congress' power over the District of Columbia is an Article I power. As such, it does not seem to have any greater status than any of the other powers enumerated in Art. I, §8.

When we try to distinguish those courts from their Article III counterparts, we find—apart from the obvious lack of Article III judges—a series of non-distinctions. By the plurality's own admission, Article I courts can operate throughout the country, they can adjudicate both private and public rights, and they can adjudicate matters arising from congressional actions in those areas in which congressional control is "extraordinary." I cannot distinguish this last category from the general "arising under" jurisdiction of Article III courts.

The plurality opinion has the appearance of limiting Article I courts only because it fails to add together the sum of its parts. Rather than limiting each other, the principles relied upon complement each other; together they cover virtually the whole domain of possible areas of adjudication. Without a unifying principle, the plurality's argument reduces to the proposition that because bankruptcy courts are not sufficiently like any of these three exceptions, they may not be either Article I courts or adjuncts to Article III courts. But we need to know why bankruptcy courts can not qualify as Article I courts in their own right.

B

The plurality opinion is not the first unsuccessful attempt to articulate a principled ground by which to distinguish Article I from Article III courts. The concept of a legislative, or Article I, court was introduced by an opinion authored by Chief Justice Marshall. Not only did he create the concept, but at the same time he started the theoretical controversy that has ever since surrounded the concept:

> "The Judges of the Superior Courts of Florida hold their offices for four years. These Courts, then, are not constitutional Courts, in which the judicial power conferred by the Constitution on the general government, can be deposited. They are incapable of receiving it. They

> are legislative Courts, created in virtue of the general right of sovereignty which exists in the government, or in virtue of that clause wich enables Congress to make all needful rules and regulations, respecting the territory belonging to the United States. The jurisdiction with which they are invested, is not a part of that judicial power which is defined in the 3d article of the Constitution, but is conferred by Congress, in the execution of those general powers which that body possesses over the territories of the United States." *American Insurance Co.* v. *Canter*, 1 Pet. 511, 546 (1828).

The proposition was simple enough: Constitutional courts exercise the judicial power described in Article III of the Constitution; legislative courts do not and cannot.

There were only two problems with this proposition. First, *Canter* itself involved a case in admiralty jurisdiction, which is specifically included within the "judicial power of the United States" delineated in Article III. How, then, could the territorial court not be exercising Article III judicial power? Second, and no less troubling, if the territorial courts could not exercise Article III power, how could their decisions be subject to appellate review in Article III courts, including this one, that can exercise only Article III "judicial" power? Yet from early on this Court has exercised such appellate jurisdiction. *Benner* v. *Porter*, 9 How. 235, 243 (1850); *Clinton* v. *Englebrecht*, 13 Wall. 434 (1872); *Reynolds* v. *United States*, 98 U.S 145, 154 (1878); *United States* v. *Coe*, 155 U. S. 76, 86 (1894); *Balzac* v. *Porto Rico*, 258 U. S. 298, 312–313 (1922). The attempt to understand the seemingly unexplainable was bound to generate "confusion and controversy." This analytic framework, however—the search for a principled distinction—has continued to burden the Court.

The first major elaboration on the *Canter* principle was in *Murray's Lessee* v. *Hoboken Land & Improvement Co.*, 18

How. 272 (1856). The plaintiff in that case argued that a proceeding against a customs collector for the collection of moneys claimed to be due to the United States was an exercise of "judicial power" and therefore had to be carried out by Article III judges. The Court accepted this premise: "It must be admitted that, if the auditing of this account, and the ascertainment of its balance, and the issuing of this process, was an exercise of the judicial power of the United States, the proceeding was void; for the officers who performed these acts could exercise no part of that judicial power." *Id.*, at 275. Having accepted this premise, the Court went on to delineate those matters which could be determined only by an Article III court, *i. e.*, those matters that fall within the nondelegable "judicial power" of the United States. The Court's response to this was twofold. First, it suggested that there are certain matters which are inherently "judicial": "[W]e do not consider congress can either withdraw from judicial cognizance any matter which, from its nature, is the subject of a suit at the common law, or in equity, or admiralty." *Id.*, at 284. Second, it suggested that there is another class of issues that, depending upon the form in which Congress structures the decisionmaking process, may or may not fall within "the cognizance of the courts of the United States." *Ibid.* This latter category consisted of the so-called "public rights." Apparently, the idea was that Congress was free to structure the adjudication of "public rights" without regard to Article III.

Having accepted the plaintiff's premise, it is hard to see how the Court could have taken too seriously its first contention. The Court presented no examples of such issues that are judicial "by nature" and simply failed to acknowledge that Article I courts already sanctioned by the Court—*e. g.*, territorial courts—were deciding such issues all the time. The second point, however, contains implicitly a critical insight; one that if openly acknowledged would have undermined the entire structure. That insight follows from the Court's earlier recognition that the term "judicial act" is broad enough to encompass all administrative action involving inquiry into facts and the application of law to those facts. *Id.*, at 280. If administrative action can be characterized as "judicial" in nature, then obviously the Court's subsequent attempt to distinguish administrative from judicial action on the basis of the manner in which Congress structures the decision cannot succeed. There need be no Article III court involvement in any adjudication of a "public right", which the majority now interprets as any civil matter arising between the Federal Government and a citizen. In that area, whether an issue is to be decided by an Article III court depends, finally, on congressional intent.

Although *Murray's Lessee* implicitly undermined Chief Justice Marshall's suggestion that there is a difference in kind between the work of Article I and that of Article III courts, it did not contend that the Court must always defer to congressional desire in this regard. The Court considered the plaintiff's contention that removal of the issue from an Article III court must be justified by "necessity." Although not entirely clear, the Court seems to have accepted this proposition: "[I]t seems to us that the just inference from the entire law is, that there was such a necessity for the warrant." *Id.*, at 285.[9]

The Court in *Murray's Lessee* was precisely right: Whether an issue can be decided by a non-Article III court does not depend upon the judicial or nonjudicial character of the issue, but on the will of Congress and the reasons Congress offers for not using an Article III court. This insight, however, was completely disavowed in the next major case to consider the distinction between Article I and Article III courts, *Ex Parte Bakelite Corp.*, 279 U. S. 438 (1929), in which the Court concluded that the Court of Customs Appeals was a legislative court. The Court there directly embraced the principle also articulated in *Murray's Lessee* that Article I courts may not consider any matter "which inherently or necessarily requires judicial determination," but only such matters as are "susceptible of legislative or executive determination." 279 U. S., at 453. It then went on effectively to bury the critical insight of *Murray's Lessee*, labelling as "fallacious" any argument that "assumes that whether a court is of one class or the other depends on the intention of Congress, whereas the true test lies in the power under which the court was created and in the jurisdiction conferred." *Id.*, at 459.[10]

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[9] By stating that "of this necessity congress alone is the judge," 18 How., at 285, the Court added some serious ambiguity to the standard it applied. Because this statement ends the Court's analysis of the merits of the claim, it does not seem to mean that the Court will simply defer to congressional judgment. Rather, it appears to mean that the Court will review the legislative record to determine whether there appeared to Congress to be compelling reasons for not establishing an Article III court.

The distinction between public and private rights as the principle delineating the proper domains of legislative and constitutional courts respectively received its death blow, I had believed, in *Crowell* v. *Benson*, 285 U. S. 22 (1932). In that case, the Court approved an administrative scheme for the determination, in the first instance, of maritime employee compensation claims. Although acknowledging the framework set out in *Murray's Lessee* and *Ex Parte Bakelite*, the Court specifically distinguished this case: "The present case does not fall within the categories just described but is one of private right, that is, of the liability of one individual to another under the law as defined."[11] *Id.*, at 51. Nevertheless, the Court approved of the use of an Article I adjudication mechanism on the new theory that "there is no requirement that, in order to maintain the essential attributes of the judicial power, all determinations of fact in constitutional courts shall be made by judges." *Ibid.* Article I courts could deal not only with public rights, but also, to an extent, with private rights. The Court now established a distinction between questions of fact and law: "The reservation of full authority to the court to deal with matters of law provides for the appropriate exercise of the judicial function in this class of cases."[12] *Id.*, at 54.

Whatever sense *Crowell* may have seemed to give to this subject was exceedingly shortlived. One year later, the Court returned to this subject, abandoning both the public/private and the fact/law distinction and replacing both with a simple literalism. In *O'Donoghue* v. *United States*, 289 U. S. 516 (1933), considering the courts of the District of Columbia, and in *Williams* v. *United States*, 289 U. S. 553 (1933), considering the Court of Claims, the Court adopted the principle that if a federal court exercises jurisdiction over cases of the type listed in Art. III, §2 as falling within the "judicial power of the United States," then that court must be an Article III court:

> "The provision of this section of the article is that the 'judicial power shall extend' to the cases enumerated, and it logically follows that where jurisdiction over these cases is conferred upon the courts of the District, the judicial power, since they are capable of receiving it, is *ipso facto*, vested in such courts as inferior courts of the United States." *O'Donoghue*, *supra*, at 545.[13]

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[10] The Court did not, however, entirely follow this priciple, for it stated elsewhere that "there is propriety in mentioning the fact that Congress always has treated [the Court of Claims as an Article I court]." 279 U. S., at 454.

[11] The plurality is clearly wrong in citing *Crowell* in support of the proposition that matters involving private, as opposed to public, rights may not be considered in a non-Article III court. *Ante*, at 19.

[12] *Crowell* also suggests that certain facts—constitutional or jurisdictional—must also be subject to *de novo* review in an Article III court. I agree with the plurality that this aspect of *Crowell* has been "undermined by later cases," *ante*, at 32 n. 34. As a matter of historical interest, however, I would contend that *Crowell*'s holding with respect to these "facts" turned more on the questions of law that were inseparably tied to them, than on some notion of the inadequacy of a non-Article III factfinder.

[13] *O'Donoghue* does not apply this principle wholly consistently: It still recognizes a territorial court exception to Article III's requirements. It

In order to apply this same principle and yet hold the Court of Claims to be a legislative court, the Court found it necessary in *Williams, supra*, to conclude that the phrase "controversies to which the United States shall be a party" in Article III must be read as if it said "controversies to which the United States shall be a party plaintiff or petitioner."[14]

By the time of the *Williams* decision, this area of the law was mystifying to say the least. What followed helped very little, if at all. In the next two major cases the Court could not agree internally on a majority position. In *National Insurance Co.* v. *Tidewater Co.*, 337 U. S. 582 (1949), the Court upheld a statute giving federal district courts jurisdiction over suits between citizens of the District of Columbia and citizens of a State. A majority of the Court, however, rejected the plurality position that Congress had the authority to assign Article I powers to Article III courts, at least outside of the District of Columbia. Only Chief Justice Vinson in dissent reflected on the other side of this problem: whether Article I courts could be assigned Article III powers. He entirely disagreed with the conceptual basis for *Williams* and *O'Donoghue*, noting that to the extent that Article I courts consider non-Article III matters, appellate review by an Article III court would be precluded. Or conversely, since appellate review is exercised by this Court over Article I courts, Article I courts must "exercise federal question jurisdiction." *Id.*, at 643. Having gone this far, the Chief Justice was confronted with the obvious question of whether in fact "the distinction between constitutional and legislative courts is meaningless." *Id.*, at 644. Although suggesting that outside of the territories or the District of

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now bases this exception, however, not on any theoretical difference in principle, but simply on the "transitory character of the territorial governments." 289 U. S., at 536.

[14] See Hart & Wechsler, The Federal Courts and The Federal System 399 (reviewing the problems of the *Williams* case and characterizing it as an "intellectual disaster").

Columbia there may be some limits on assignment to Article I courts of matters that fall within Article III jurisdiction—apart from federal question jurisdiction—for the most part the Chief Justice ends up relying on the good will of Congress: "[W]e cannot impute to Congress an intent now or in the future to transfer jurisdiction from constitutional to legislative courts for the purpose of emasculating the former." *Ibid.*

Another chapter in this somewhat dense history of a constitutional quandry was provided by Justice Harlan's plurality opinion in *Glidden Company* v. *Zdanok*, 370 U. S. 530 (1962), in which the Court, despite *Bakelite* and *Williams*—and relying on an Act of Congress enacted since those decisions—held the Court of Claims and the Court of Customs and Patent Appeals to be Article III courts. Justice Harlan continued the process of intellectual repudiation begun by Chief Justice Vinson in *Tidewater*. First, it was clear to him that Chief Justice Marshall could not have meant what he said in *Canter* on the inability of Article I courts to consider issues within the jurisdiction of Article III courts: "Far from being 'incapable of receiving' federal-question jurisdiction, the territorial courts have long exercised a jurisdiction commensurate in this regard with that of the regular federal courts and have been subjected to the appellate jurisdiction of this Court precisely because they do so." *Id.*, at 545 n. 13. Second, exceptions to the requirements of Article III, he thought, have not been founded on any principled distinction between Article I issues and Article III issues; rather, a "confluence of practical considerations," *id.*, at 547, account for this Court's sanctioning of Article I courts:

> "The touchstone of decision in all these cases has been the need to exercise the jurisdiction then and there and for a transitory period. Whether constitutional limitations on the exercise of judicial power have been held inapplicable has depended on the particular local setting,

> the practical necessities, and the possible alternatives." *Id.*, at 547–548.

Finally, recognizing that there is frequently no way to distinguish between between Article I and Article III courts on the basis of the work they do, Justice Harlan suggested that the only way to tell them apart is to examine the "establishing legislation" to see if it complies with the requirements of Article III. This, however, comes dangerously close to saying that Article III courts are those with Article III judges; Article I courts are those without such judges. One hundred and fifty years of constitutional history, in other words, had led to a simple tautology.

IV

The complicated and contradictory history of the issue before us leads me to conclude that Chief Justice Vinson and Justice Harlan reached the correct conclusion: There is no difference in principle between the work that Congress may assign to an Article I court and that which the Contitution assigns to Article III courts. Unless we want to overrule a large number of our precedents upholding a variety of Article I courts—not to speak of those Article I courts that go by the contemporary name of "administrative agencies"—this conclusion is inevitable. It is too late to go back that far; too late to return to the simplicity of the principle pronounced in Article III and defended so vigorously and persuasively by Hamilton in The Federalist Nos. 78–82.

To say that the Court has failed to articulate a principle by which we can test the constitutionality of a putative Article I court, or that there is no such abstract principle, is not to say that this Court must always defer to the legislative decision to create Article I, rather than Article III, courts. Article III is not to be read out of the Constitution; rather, it should be read as expressing one value that must be balanced against competing constitutional values and legislative responsibilities. This Court retains the final word on how that balance is to be struck.

Despite the principled, although largely mistaken, rhetoric expanded by the Court in this area over the years, such a balancing approach stands behind many of the decisions upholding Article I courts. Justice Harlan suggested as much in *Glidden*, although he needlessly limited his consideration to the "temporary" courts that Congress has had to set up on a variety of occasions. In each of these instances, this Court has implicitly concluded that the legislative interest in creating an adjudicative institution of temporary duration outweighed the values furthered by a strict adherence to Article III. Besides the territorial courts approved in *Canter, supra*, these courts have included the Court of Private Land Claims, *United States* v. *Coe*, 155 U. S. 76 (1894), the Choctaw and Chickasaw Citizenship Court, *Stephens* v. *Cherokee Nation*, 174 U. S. 445 (1899); and consular courts established in foreign countries, *In re Ross*, 140 U. S. 453 (1891). This same sort of "practical" judgment was voiced, even if not relied upon, in *Crowell, supra*, with respect to the Employees' Compensation Claims Commission, which was not meant to be of limited duration: "[W]e are unable to find any constitutional obstacle to the action of the Congress in availing itself of a method shown by experience to be essential in order to apply its standards to the thousands of cases involved." 285 U. S., at 54. And even in *Murray's Lessee*, there was a discussion of the "necessity" of Congress' adopting an approach that avoided adjudication in an Article III court. 18 How., at 285.

This was precisely the approach taken to this problem in *Palmore* v. *United States*, 411 U. S. 389 (1973), which, contrary to the suggestion of the majority, did not rest on any theory of territorial or geographical control. *Ante*, at 24. Rather, it rested on an evaluation of the strength of the legislative interest in pursuing in this manner one of its constitutionally assigned responsibilities—a responsibility not different in kind from numerous other legislative responsibilities. Thus, *Palmore* referred to the wide variety of Article I courts, not just territorial courts. It is in this light that the critical statement of the case must be understood:

> "[T]he requirements of Article III, which are applicable where laws of national applicability and affairs of national concern are at stake, must in proper circumstances give way to accommodate plenary grants of power to Congress to legislate with respect to specialized areas having particularized needs and warranting distinctive treatment." *Id.*, at 407–408.

I do not suggest that the Court should simply look to the strength of the legislative interest and ask itself if that interest is more compelling than the values furthered by Article III. The inquiry should, rather, focus equally on those Article III values and ask whether and to what extent the legislative scheme accommodates them or, conversely, substantially undermines them. The burden on Article III values should then be measured against the values Congress hopes to serve through the use of Article I courts.

To be more concrete: *Crowell*, *supra*, suggests that the presence of appellate review by an Article III court will go a long way toward insuring a proper separation of powers. Appellate review of the decisions of legislative courts, like appellate review of state court decisions, provides a firm check on the ability of the political institutions of government to ignore or transgress constitutional limits on their own authority. Obviously, therefore, a scheme of Article I courts that provides for appellate review by Article III courts should be substantially less controversial than a legislative attempt entirely to avoid judicial review in a constitutional court.

Similarly, as long as the proposed Article I courts are designed to deal with issues likely to be of little interest to the political branches, there is less reason to fear that such courts represent a dangerous accumulation of power in one of the political branches of government. Chief Justice Vinson suggested as much when he stated that the Court should guard against any congressional attempt "to transfer jurisdiction for the purpose of emasculating" constitutional courts. *National Insurance Co.* v. *Tidewater Co.*, 337 U. S., at 644.

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I believe that the new bankruptcy courts established by the Bankruptcy Reform Act of 1978, 28 U. S. C. § 1471 (1976 ed., supp. III), satisfy this standard.

First, ample provision is made for appellate review by Article III courts. Appeals may in some circumstances be brought directly to the district courts. 28 U. S. C. § 1334. Decisions of the district courts are further appealable to the court of appeals. § 1293. In other circumstances, appeals go first to a panel of bankruptcy judges, § 1482, and then to the court of appeals. § 1293. In still other circumstances — when the parties agree—appeals may go directly to the court of appeals. In sum, there is in every instance a right of appeal to at least one Article III court. Had Congress decided to assign all bankruptcy matters to the state courts, a power it clearly possesses, no greater review in an Article III court would exist. Although I do not suggest that this analogy means that Congress may establish an Article I court wherever it could have chosen to rely upon the state courts, it does suggest that the critical function of judicial review is being met in a manner that the Constitution suggests is sufficient.

Second, no one seriously argues that the Bankruptcy Reform Act represents an attempt by the political branches of government to aggrandize themselves at the expense of the third branch or an attempt to undermine the authority of constitutional courts in general. Indeed, the congressional perception of a lack of judicial interest in bankruptcy matters was one of the factors that led to the establishment of the bankruptcy courts: Congress feared that this lack of interest would lead to a failure by federal district courts to deal with bankruptcy matters in an expeditious manner. H.R. Rep. No. 95-595, 95th Cong., 1st Sess. 14 (1977). Bankruptcy matters are, for the most part, private adjudications of little political significance. Although some bankruptcies may indeed present politically controversial circumstances or issues, Congress has far more direct ways to involve itself in such matters than through some sort of subtle, or not so subtle, influence on bankruptcy judges. Furthermore, were such circumstances to arise, the Due Process Clause might very well require that the matter be considered by an Article III judge: Bankruptcy proceedings remain, after all, subject to all of the strictures of that constitutional provision.[15]

Finally, I have no doubt that the ends that Congress sought to accomplish by creating a system of non-Article III bankruptcy courts were at least as compelling as the ends found to be satisfactory in *Palmore, supra*, or the ends that have traditionally justified the creation of legislative courts. The stresses placed upon the old bankruptcy system by the tremendous increase in bankruptcy cases were well documented and were clearly a matter to which Congress could respond.[16] I don't believe it is possible to challenge Congress' further determination that it was necessary to create a specialized court to deal with bankruptcy matters. This was the nearly uniform conclusion of all those that testified before Congress on the question of reform of the bankruptcy system, as well as the conclusion of the Commission on Bankruptcy Laws established by Congress in 1970 to explore possible improvements in the system.[17]

The real question is not whether Congress was justified in establishing a specialized bankruptcy court, but rather whether it was justified in failing to create a specialized, Article III bankruptcy court. My own view is that the very fact of extreme specialization may be enough, and certainly has been enough in the past,[18] to justify the creation of a legislative court. Congress may legitimately consider the effect on the federal judiciary of the addition of several hundred specialized judges: We are, on the whole, a body of generalists.[19] The addition of several hundred specialists may substantially change, whether for good or bad, the character of the federal bench. Moreover, Congress may have desired to maintain some flexibility in its possible future responses to the general problem of bankruptcy. There is no question that the existence of several hundred bankruptcy judges with life-tenure would have severely limited Congress' future options. Furthermore, the number of bankruptcies may fluctuate producing a substantially reduced need for bankruptcy judges. Congress may have thought that, in that event, a bankruptcy specialist should not as a general matter serve as a judge in the countless nonspecialized cases that come before the federal district courts. It would then face the prospect of large numbers of idle federal judges. Finally, Congress may have believed that the change from bankruptcy referees to Article I judges was far less dramatic, and so less disruptive of the existing bankruptcy and constitutional court systems, than would be a change to Article III judges.

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[15] See *Crowell* v. *Benson* 285 U. S. 22, 87 (Brandeis, J., dissenting) ("If there be any controversy to which the judicial power extends that may not be subjected to the conclusive determination of administrative bodies or federal legislative courts, it is not because of any prohibition against the diminution of the jurisdiction of the federal district courts as such, but because, under the circumstances, the constitutional requirement of due process is a requirement of judicial process.")

[16] "During the past 30 years, the number of bankruptcy cases filed annually has increased steadily from 10,000 to over 254,000." H.R. Rep. No. 95-595, at 21.

[17] See H.R. Doc. No. 93-137 (Pt1), 93d Cong., 1st Sess. 85-96 (1973).

For all of these reasons, I would defer to the congressional judgment. Accordingly, I dissent.

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[18] Consider, for example, the Court of Customs and Patent Appeals considered in *Ex Parte Bakelite*, *supra*, or the variety of specialized administrative agencies that engage in some form of adjudication.

[19] In 1977, there were approximately 190 full-time and 30 part-time bankruptcy judges throughout the country. H.R. Rep. 95-595, at 9.

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(Slip Opinion)

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SUPREME COURT OF THE UNITED STATES

Syllabus

UNITED STATES v. SECURITY INDUSTRIAL BANK ET AL.

APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

No. 81-184. Argued October 6, 1982—Decided November 30, 1982

A provision of the Bankruptcy Reform Act of 1978, 11 U. S. C. § 522(f)(2) (1976 ed., Supp. V), permits individual debtors in bankruptcy proceedings to avoid nonpossessory, nonpurchase-money liens on certain property, including household furnishings and appliances. Appellees loaned individual debtors money and obtained and perfected such liens on the debtors' household furnishings and appliances before the 1978 Act was enacted. Subsequently, these debtors instituted separate bankruptcy proceedings under the 1978 Act. Sections 522(b) and (d) exempt household items from the property included within debtors' estates. The debtors claimed these exemptions, relying on § 522(f)(2) to avoid the liens. The Bankruptcy Courts refused to apply § 522(f)(2) retroactively to abrogate the liens. The Court of Appeals in consolidated appeals affirmed, holding that, although the 1978 Act was intended to apply retrospectively and thus was designed to invalidate liens acquired before the enactment date, such an application violates the Takings Clause of the Fifth Amendment.

Held: Section 522(f)(2) was not intended to be applied retrospectively to destroy pre-enactment property rights. Pp. 3–12

(a) Where there is substantial doubt whether retroactive destruction of appellees' liens would comport with the Fifth Amendment, the cardinal principle that this Court will first determine whether a construction of a statute is fairly possible by which the constitutional question may be avoided warrants a consideration of whether, as a matter of statutory construction, § 522(f)(2) must necessarily be applied retroactively. Pp. 3–8.

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(b) No bankruptcy law shall be construed to eliminate property rights that existed before the law was enacted in the absence of an explicit com-

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Syllabus

mand from Congress. In light of this principle, in the absence of a clear expression of Congress' intent to apply § 522(f)(2) to property rights established before the enactment date, the statute will not be construed in a manner that could call upon this Court to resolve difficult and sensitive questions arising out of the guarantees of the Takings Clause. Pp. 11–12.

642 F. 2d 1193, affirmed.

REHNQUIST, J., delivered the opinion of the Court, in which BURGER, C. J., and WHITE, POWELL, STEVENS, and O'CONNOR, JJ., joined. BLACKMUN, J., filed an opinion concurring in the judgment, in which BRENNAN and MARSHALL, JJ., joined.

NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D.C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

SUPREME COURT OF THE UNITED STATES

No. 81-184

UNITED STATES, APPELLANT *v.* SECURITY INDUSTRIAL BANK ET AL.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

[November 30, 1982]

JUSTICE REHNQUIST delivered the opinion of the Court.

This case concerns the effect of 11 U. S. C. § 522(f)(2), which permits individual debtors in bankruptcy proceedings to avoid liens on certain property. The Court of Appeals consolidated seven appeals from the Bankruptcy Courts for the Districts of Kansas and Colorado. In each case the debtor was an individual who instituted bankruptcy proceedings after the Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, 92 Stat. 2549 ("the 1978 Act"), became effective on October 1, 1979. In each case one of the appellees had loaned the debtor money and obtained and perfected a lien on the debtor's household furnishings and appliances before the 1978 Act was enacted on November 6, 1978. None of these liens was possessory, and none secured purchase-money obligations.

Included within the personal property subject to the appellees' liens were household items that are exempt from the property included within the debtors' estates by virtue of subsections (b) and (d) of § 522.[1] The debtors claimed these exemptions in their respective bankruptcy proceedings, relying on § 522(f)(2) to avoid the liens. That section provides:

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[1] The exemptions were designed to permit individual debtors to retain exempt property so that they will be able to enjoy a "fresh start" after bankruptcy.

Subsections (b) and (d) of § 522 provide in pertinent part:

> "Notwithstanding any waiver of exemptions, the debtor may avoid the fixing of a lien on an interest of the debtor in property to the extent such lien impairs an exemption to which the debtor would have been entitled under subsection (b) of this section, if such lien is—
>
> (2) a nonposessory, nonpurchase-money security interest in any—
>
> (A) household furnishings, household goods, wearing apparel, appliances, books, animals, crops, musical instruments, or jewelry that are held primarily for the personal, family, or household use of the debtor or a dependent of the debtor;
>
> (B) implements, professional books, or tools, of the trade of the debtor or of a dependent of the debtor; or
>
> (C) professionally presecribed health aids for the debtor or a dependent of the debtor."

The appellees asserted that application of § 522(f)(2) to liens acquired before the enactment date would violate the

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(b) [A]n individual debtor may exempt from the property of the estate . . . (1) property that is specified under subsection (d) of this section.

(d) The following property may be exempted under subsection (b)(1) of this section:

(3) The debtor's interest, not to exceed $200 in value in any perticular item, in household furnishings, household goods, wearing apparel, appliances, books, animals, crops, or musical instruments, that are held primarily for the personal, family or household use of the debtor or a dependent of the debtor.

(4) The debtor's aggregate interest, not to exceed $500 in value, in jewelry held primarily for the personal, family, or household use of the debtor or the dependent of the debtor.

(6) The debtor's aggregate interest, not to exceed $750 in value, in any implements, professional books, or tools, of the trade of the debtor or the trade of a dependent of the debtor.

(9) Professionally described health aids for the debtor or a dependent of the debtor.

Fifth Amendment. The United States intervened in each case to defend the constitutionality of the federal statute,[2] but the bankruptcy courts in each case refused to apply § 522(f)(2) to abrogate liens acquired before the enactment date.[3]

The Court of Appeals consolidated the cases and affirmed the judgments of the bankruptcy courts. 642 F. 2d 1195 (CA10 1981). It held that the 1978 Act was intended to apply retrospectively, and thus was designed to invalidate liens acquired before the enactment date. It also held, however, that such an application violates the Fifth Amendment. The court stated that § 522(f)(2) effects a "complete taking of the secured creditors' property interest," and is thus invalid under *Louisville Joint Stock Land Bank* v. *Radford*, 295 U. S. 555 (1935).[4] The United States appealed, and we noted probable jurisdiction. —— U. S. —— (1982).

The appellees, of course, defend the judgment of the Court of Appeals.[5] The government argues at some length that retrospective application of § 522(f)(2) to these liens would not violate the Fifth Amendment. It contends that the enactment is a "rational" exercise of Congress' bankruptcy power, that for "bankruptcy purposes" property interests are all but indistinguishable from contractual interests, that these particular interests were "insubstantial" and therefore their destruction does not amount to a "taking" of property requiring compensation. We do not decide the constitutional question reached by the Court of Appeals. We address it only to determine whether the attack on the retrospective application of the statute raises substantial enough constitutional doubts to warrant the employment of the canon of statutory construction referred to *post*, 8–10.

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[2] See 28 U. S. C. § 2403(a).

[3] In *Schulte* v. *Beneficial Finance of Kansas, Inc.*, No. 79-11718, and *Hunter* v. *Beneficial Finance of Kansas, Inc.*, No. 79-11745, the Bankruptcy Court for the District of Kansas noted that retrospective application of § 522(f)(2) creates constitutional problems and held that it should be applied only prospectively. In *Jackson* v. *Security Industrial Bank*, No. 80 C 1078, *Stevens* v. *Liberty Loan Corp.*, No. 80 Mc 0056, *Rodrock* v. *Security Industrial Bank*, No. 80 M 0014, and *Knezel* v. *Security Industrial Bank*, No. 80 M 0224, the Bankruptcy Court for the District of Colorado concluded that § 522(f)(2), as applied retrospectively, violates the Due Process Clause of the Fifth Amendment. In *Hoops* v. *Freedom Finance*, No. 80 K 0294, the Bankruptcy Court for the District of Colorado concluded that § 522(f)(2), as applied retrospectively, violates "substantive due process."

[4] *In re Gifford*, —— F. 2d ——, No. 81-1174, (CA7 August 18, 1982) (en banc), holds that § 522(f)(2) constitutionally applies to liens created before the enactment date. *In re Webber*, 674 F. 2d 796 (CA9 1982), holds that § 522(f)(2) consititutionally applies to liens created before the Act became effective but after the enactment date. *In re Ashe*, 669 F. 2d 105 (CA3 1982), holds that § 522(f)(1), which permits avoidance of certain judicial liens, consititutionally applies to a cognovit note created before the enactment date.

It may be readily agreed that § 522(f)(2) is a rational exercise of Congress' authority under Article I, Section 8, Clause 4, and that this authority has been regularly construed to authorize the retrospective impairment of contractual obligations. *Hanover National Bank* v. *Moyses*, 186 U. S. 181, 188 (1902). Such agreement does not, however, obviate the additional difficulty that arises when that power is sought to be used to defeat traditional property interests. The bankruptcy power is subject to the Fifth Amendment's prohibition against taking private property without compensation. *Louisville Joint Stock Land Bank* v. *Radford*, 295 U. S. 555 (1935). Thus, however "rational" the exercise of the bankruptcy power may be, that inquiry is quite separate from the question whether the enactment takes property within the prohibition of the Fifth Amendment.

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[5] Appellee Beneficial Finance of Kansas, Inc. asserts that the judgments should be affirmed because the Act violates Article III of the Constitution by granting judicial power to non-Article III bankruptcy judges. See *Northern Pipeline Construction Co.* v. *Marathon Pipe Line Co.*, — U. S. — (1982) (plurality opinion of BRENNAN, J.); *id.*, at — (REHNQUIST, J., concurring in the judgment). Because our decision in *Northern Pipeline* is prospective only, *id.*, at —, and because we have stayed the issuance of our mandate in that case to December 24, 1982, — U.S. —, that decision does not affect the judgment in this case.

The government apparently contends (Brief for the United States, at 30–32) that because cases such as *Arnett* v. *Kennedy*, 416 U. S. 134 (1974) and *Goldberg* v. *Kelly*, 397 U. S. 254 (1970) defined "property" for purposes of the Due Process Clause sufficiently broadly to include rights which at common law would have been deemed contractual, traditional property rights are entitled to no greater protection under the takings clause than traditional contract rights. It argues that "bankruptcy principles do not support a sharp distinction between the rights of secured and unsecured creditors." Brief for the United States, at 31. However "bankruptcy principles" may speak to this question, our cases recognize, as did the common law, that the contractual right of a secured creditor to obtain repayment of his debt may be quite different in legal contemplation from the property right of the same creditor in the collateral. Compare *Hanover National Bank* v. *Moyses*, *supra*, with *Louisville Joint Stock Land Bank* v. *Radford*, *supra*, and *Kaiser-Aetna* v. *United States*, 444 U. S. 164 (1979).

Since the governmental action here would result in a complete destruction of the property right of the secured party, the case fits but awkwardly into the analytic framework employed in *Penn Central Transportation Co.* v. *New York City*, 438 U. S. 194 (1978) and *PruneYard Shopping Center* v. *Robbins*, 447 U. S. 74 (1980), where governmental action affected some but not all of the "bundle of rights" which comprise the "property" in question. The government argues that the interest of a secured party such as was involved here is "insubstantial," apparently in part because it is a nonpurchase-money, non-possessory interest in personal property. The "bundle of rights" which accrues to a secured party is obviously smaller than that which accrues to an owner in fee simple, but the government cites no cases supporting the proposition that differences such as these relegate the secured party's interest to something less than property.[6] And our decisions in *Radford*, *supra*, and *Armstrong* v. *United States*, 364 U. S. 40 (1961), militate against such a proposition.

In *Radford*, we held that the Frazier-Lemke Act, June 28, 1934, c. 869, 48 Stat. 1289, violated the takings clause. The bank held a nonpurchase-money mortgage on Radford's farm. Radford defaulted and instituted bankruptcy proceedings. The Frazier-Lemke Act, which by its terms applied only retrospectively, permitted the debtor to purchase the property for less than its fair market value.[7] We held the statute was void because it effected a "taking of substantive rights in specific property acquired by the Bank prior to" its enactment. 295 U. S., at 590. In his opinion for the Court, Justice Brandeis stated:

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[6] At oral argument the government conceded that the liens at issue in this case are treated as property under state law. Tr. Oral Arg., at 21.

Both Kansas and Colorado have adopted the Uniform Commercial Code. Although under the Code the priority among secured parties is often affected by the purchase money or possessory character of security interests, see, *e. g.*, § 9-312, these characterizations do not affect the nature of the security interest. See §§ 9-107 (defining "purchase money security interest"), 9-305 (providing for perfection of security interests by posession).

Section 101(28) of the 1978 Act defines a lien as a "charge against or interest in property to secure payment of a debt or performance of an obligation." It does not make distinctions based on the purchase-money or possessory nature of a lien.

[7] The Frazier-Lemke Act permitted the farmer, if the mortgagee assented, to purchase the property at its then appraised value on a deferred payment plan. If the mortgagee refused to assent, the court was required to stay all proceedings for 5 years, during which time the farmer could retain posession by paying a reasonable rent. After 5 years the property could be reappraised, but the farmer still had the right to purchase it free and clear for the appraised value regardless of the amount of the lien. See *Radford*, *supra*, at 557-558. Given the interest rate of 1%, the present value of the deferred payments was much less than the value of the property. *Id.*, at 591-593.

> "[T]he Fifth Amendment commands that, however great the Nation's need, private property shall not be thus taken even for a wholly public use without just compensation. If the public interest requires, and permits, the taking of property of individual mortgagees in order to relieve the necessities of individual mortgagors, resort must be had to proceedings by eminent domain; so that, through taxation, the burden of the relief afforded in the public interest may be borne by the public." *Id.*, at 602.

In *Armstrong*, materialmen delivered materials to a prime contractor for use in constructing navy personnel boats. Under state law, they obtained liens in the vessels.[8] The prime contractor defaulted on his obligations to the United States, and the government took title to and possession of the uncompleted hulls and unused materials, thus making it impossible for the materialmen to enforce their liens. We held that this constituted a taking:

> "The total destruction by the government of all compensable value of these liens, which constitute compensable property, has every possible element of a Fifth Amendment 'taking' and is not a mere 'consequential incidence' of a valid regulatory measure." 364 U. S., at 48.

The government seeks to distinguish *Armstrong* on the ground that it was a classical "taking" in the sense that the government acquired for itself the property in question, while in the instant case the government has simply imposed a general economic regulation which in effect transfers the property interest from a private creditor to a private debtor.

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[8] Under the Uniform Commercial Code definition, these statutory liens would be nonpossessory, nonpurchase-money liens in personal property. See note 5, *supra*.

While the classical taking is of the sort that the government describes, our cases show that takings analysis is not necessarily limited to outright acquisitions by the government for itself. See *Loretto* v. *Teleprompter Manhattan CATV Corp.*, —— U. S. ——, 102 S.Ct. 3164 (June 28, 1982); *PruneYard Shopping Center* v. *Robbins*, *supra*; *Pennsylvania Coal Co.* v. *Mahon*, 260 U. S. 393, 415 (1922).

The government finally contends that because the resale value of household goods is generally low, and because creditors therefore view the principal value of their security as a lever to negotiate for reaffirmation of the debt rather than as a vehicle for foreclosure, the property interests involved here do not merit protection under the takings clause. While this contention cannot be dismissed out of hand, it seems to run counter to the state's characterization of the interest as property, see note 5, *supra*, to our reliance in other "takings" cases on state law characterizations, see, *e. g.*, *Kaiser-Aetna* v. *United States*, *supra*, 444 U. S. 164, 179, and also to at least some of the implications of *Radford*, *supra*, and *Armstrong*, *supra*.

The foregoing discussion satisfies us that there is substantial doubt whether the retroactive destruction of the appellees' liens in these cases comports with the Fifth Amendment. We now consider whether, as a matter of statutory construction, § 522(f)(2) must necessarily be applied in that manner. We consider the statutory question because of the "'cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the constitutional question may be avoided.'" *Lorillard* v. *Pons*, 434 U. S. 575, 577 (1978), quoting *Crowell* v. *Benson*, 285 U. S. 22, 62 (1932).

The Court of Appeals thought § 522(f)(2) must apply retroactively, that is, to liens which attached before the enactment date, because "there would be *no* bankruptcy law applicable to cases involving such liens if it did not." 642 F. 2d, at 1197.

The court apparently thought that if § 522(f)(2) does not apply to liens which came into existence before the enactment date, then no part of the 1978 Act could apply to cases involving such liens. This is not necessarily the case. The liens, of course, exist under state law independently of the 1978 Act. Although the 1978 Act, in general, is effective for all cases commenced after its effective date, Congress might have intended that provisions that destroy previously vested property rights apply only to interests that came into effect after the enactment date. If § 522(f)(2) is such a provision, the remainder of the 1978 Act would not affect the enforceability of these liens, but would still apply to these liens and these cases. We think that the analysis of the Court of Appeals did not adequately dispose of the question as to the retrospective effect of § 522(f), and we therefore pursue the inquiry further.

The principle that statutes operate only prospectively, while judicial decisions operate retrospectively, is familiar to every law student. *Compare* Sands, Sutherland's Statutory Construction § 106 *with Linkletter* v. *Walker*, 381 U. S. 618, 622–625 (1965). This Court has often pointed out that

> the first rule of construction is that legislation must be considered as addressed to the future, not to the past. . . . The rule has been expressed in varying degrees of strength but always of one import, that a retrospective operation will not be given to a statute which interferes with antecedent rights . . . unless such be "the unequivocal and inflexible import of the terms, and the manifest intention of the legislature."

Union Pacific R. Co. v. *Laramie Stock Yards Co.*, 231 U. S. 190, 199 (1913) (citations omitted). See, *e. g., United States Fidelity & Guaranty Co.* v. *Struthers Wells Co.*, 209 U. S. 306, 314 (1908) ("The presumption is very strong that a statute was not meant to act retrospectively, and it ought never to receive such a construction if it is susceptible of any other."); *United States* v. *The Peggy*, 5 U. S. (1 Cranch) 103, 110 (1801).

This principle has been repeatedly applied to bankruptcy statutes affecting property rights. In *Holt* v. *Henley*, 232 U. S. 637 (1914), the Court had before it a new statute granting bankruptcy trustees the position of a lienholder with priority over sellers on conditional sales contracts. Act of June 25, 1910, c. 412, § 8, 26 Stat. 838, 840. This provision, like § 522(f)(2), could be read literally to divest property interests which had been created before it was enacted. The 1910 statute, like the 1978 Act, applied to all bankruptcy cases instituted after it became effective.[9] Nonetheless, the Court followed the lead of the lower courts in refusing to infer retroactivity absent an explicitly "expressed intent of Congress." *Arctic Ice Machine Co.* v. *Armstrong County Trust Co.*, 192 F. 114, 116 (CCA 3 1911). See also *In re Schneider*, 203 F. 589, 590 (E.D. Pa. 1913). In his opinion for the unanimous Court, Justice Holmes stated "that the reasonable and usual interpretation of [bankruptcy] statutes is to confine their effect, so far as it may be, to property rights established after they were passed." 232 U. S., at 639. See *Auffm'ordt* v. *Rasin*, 102 U. S. 620, 622 (1881).

The government nonetheless contends that bankruptcy statutes are usually construed to apply to preexisting rights. This statement is unobjectionable in the context of traditional contract rights, *Hanover National Bank* v. *Moyses*, *supra*, 186 U. S., at 188, but none of the cases cited by the government extend it to property rights such as those involved here.[10]

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[9] The transition provisions of the 1910 statute, *id.*, § 14, 36 Stat. at 842, are, in substance, the same as those of the 1978 Act. Pub. L. No. 95-598, Title IV, §§ 402, 403(a), Nov. 6, 1978, 92 Stat. 2682, 2683.

[10] *Claridge Apartments Co.* v. *Commissioner*, 323 U. S. 141 (1944), involved rights to certain tax benefits, not to property rights. *Dickinson*

Neither these cases, nor any other that has come to our attention, casts doubt on the principle of statutory construction deducible from *Holt* and *Auffmordt*: No bankruptcy law shall be construed to eliminate property rights which existed before the law was enacted in the absence of an explicit command from Congress. In light of this principle, the legislative history of the 1978 Act suggests that Congress may not have intended that § 522(f) operate to destroy pre-enactment property rights.

An early version of the 1978 Act contained an explicit requirement that all its provisions "shall apply in all cases or proceedings instituted after its effective date, regardless of the occurrence of any of the operative facts determining legal rights, duties or liabilities hereunder." H.R. 31, 94th Cong., 1st Sess., § 10–103(a) (1975), reprinted in Bankruptcy Act Revision: Hearings on H.R. 31 and H.R. 32 before the Subcomm. on Civil and Constitutional Right of the House Comm. on the Judiciary, 94th Cong., 1st Sess. (1975), n. 14 app., at 320–321. This provision may or may not have been deleted directly in response to the comments of witness William Plumb to the effect that retroactive invalidation of liens

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Industrial Site, Inc. v. *Cowan*, 309 U. S. 382, 383 (1940), dealt with the application of new procedural rules to a bankruptcy proceeding that was pending when the new statute was enacted. Allowing an appeal to the Circuit Court rather than the District Court in that case did not eliminate any property rights. *Carpenter* v. *Wabash Ry.*, 309 U. S. 23 (1940), involved a provision giving personal injury judgments the status of operating expenses and thus priority over mortgages in ongoing railroad reorganizations. Although that statute may have disadvantaged the mortgagees by reducing the amount of cash available to pay their notes, it did not affect their property right in the collateral securing the mortgages. *McFaddin* v. *Evans-Snider-Buel Co.*, 185 U. S. 505 (1902), considered a curative statute providing the methods by which valid mortgages could be created in the Indian Territory. The *Legal Tender Cases*, 79 U. S. (12 Wall.) 457, 549–550 (1870), decided only that debts could be paid in legal tender as defined by Congress at the time of payment without impairing the obligation of contracts.

may be an unconstitutional taking. *Id.*, at 2066–2067. Nonetheless, Congress's elimination of an explicit command is some evidence that it did not intend to depart from the usual principle of construction. See *Bradley* v. *Richmond School Board*, 416 U. S. 696, 716, n. 23 (1974) ("We are reluctant to read into the statute the very . . . limitation that Congress eliminated.").

"Accordingly, in the absence of a clear expression of Congress' intent to" apply § 522(f)(2) to property rights established before the enactment date,[11] "we decline to construe the Act in a manner that could in turn call upon the Court to resolve difficult and sensitive questions arising out of the guarantees of the" takings clause. *N.L.R.B.* v. *Catholic Bishop of Chicago*, 440 U. S. 490, 507 (1979).[12] The judgment of the Court of Appeals must therefore be

Affirmed

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[11] Because all of the liens at issue in this case were established before the enactment date we have no occasion to consider whether § 522(f)(2) should be applied to liens established after Congress passed the Act, but before it became effective.

[12] "When aid to construction of the meaning of words, as used in the statute, is available, there certainly can be no 'rule of law' which forbids its use, however clear the words may appear on 'superficial examination.' . . . Obviously there is danger that the courts' conclusion as to legislative purpose will be unconsciously influenced by the judges' own views or by factors not considered by the enacting body. A lively appreciation of the danger is the best assurance of escape from its threat but hardly justifies an acceptance of a literal interpretation dogma which withholds from the courts available information for reaching a correct conclusion. A few words of general connotation appearing in the text of statutes should not be given a wide meaning, contrary to a settled policy, 'excepting as a different purpose is plainly shown.'" *United States* v. *American Trucking Association*, 310 U. S. 534, 543–544 (1940) (footnotes omitted).

SUPREME COURT OF THE UNITED STATES

No. 81-184

UNITED STATES, APPELLANT *v.* SECURITY INDUSTRIAL BANK ET AL.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

[November 30, 1982]

JUSTICE BLACKMUN, with whom JUSTICE BRENNAN and JUSTICE MARSHALL join, concurring in the judgment.

This case concerns the Bankruptcy Act of 1978, 11 U. S. C. § 101 *et seq.* (1976 ed., Supp. V), and, in particular, the exemption provisions of § 522 of that Act. Specifically at issue is the effect of certain of these exemption provisions upon nonpossessory, nonpurchase-money obligations given by debtors to small loan companies before the enactment of the Act. The purported liens apply generally, not specifically, to property of the kind described and, as a practicable matter, there is nothing to prevent the debtor's selling the property and replacing it or not replacing it, just as he chooses.

Section 522, for the first time, established a set of federal exemptions for individual debtors. Concededly, the section, as all similar statutes, was enacted to protect the debtor's essential needs and to enable him to have a fresh start economically. Section 522(f)(2) permits the debtor to "avoid the fixing" of a nonpossessory, nonpurchase-money security interest in certain property, but the subsection does not extend to all property otherwise exempt under § 522(d). It is limited to certain personal items, such as household furnishings, wearing apparel, jewelry, tools of the debtor's trade, and professionally prescribed health aids.

The Court naturally struggles with the question of the application of the new exemption provisions to obligations created before the new Act. It notes its concern with constitutional problems and it also greets with obvious relief the possibility of construing the Act as being only prospective in its operation. It then quickly pursues the latter route in order to avoid any constitutional issue.

I understand and can sympathize with the Court's desire thus to resolve the case. It is usually much easier to construe a statute so as to avoid a constitutional issue than it is to resolve the constitutional issue itself. And, of course, the Court's cases have announced that, where feasible, this is the preferred method. See, *e. g.*, *Lorillard* v. *Pons*, 434 U. S. 575, 577 (1978).

Were we writing on a "clean slate," however, I would not pursue, in this case, that principle of construction-preference, for I think that the case would deserve consideration in greater depth. I see nothing in the statute with which we are concerned that speaks or hints of only prospective applicability, or that compels it, and I would find it necessary to reach the constitutional issue. I would then resolve that issue in favor of the debtor and against the small loan company creditor. I would do so because the exemptions in question are limited as to kinds of property and as to values; because the amount loaned has little or no relationship to the value of the property; because these asserted lien interests come close to being contracts of adhesion; because repossessions by small loan companies in this kind of situation are rare; because the purpose of the statute is salutary and is to give the debtor a fresh start with a minimum for necessities; because there has been creditor abuse; because Congress merely has adjusted priorities, and has not taken for the Government's use or for public use; because the exemption provisions in question affect the remedy and not the debt; because the security interest seems to have little direct value and weight in its own right and appears useful mainly as a convenient tool with which to threaten the debtor to reaffirm the underlying obligation; because the statute is essentially economic regulation and insubstantial at that; and because there is an element of precedent favorable to the debtor to be found in such cases as *Penn Central Transp. Co.* v. *New York City*, 438 U. S. 104 (1978), and *PruneYard Shopping Center* v. *Robins*, 447 U. S. 74 (1980).

But we are not writing on a clean slate. It seems to me that the case of *Holt* v. *Henley*, 232 U. S. 637 (1914), is precisely in point and, unless the Court chooses to overrule it, must control the present case. There, Holt and the eventual bankrupt signed an agreement in 1909 for the installation of an automatic sprinkler system on the property of the eventual bankrupt. The agreement specified that the system was to remain Holt's property until paid for and that he was to have a right to enter and remove it upon failure to pay as agreed. Thereafter, but also in 1909, a mortgage deed was executed covering the plant and what was "acquired and placed upon the said premises during the continuance of this trust." *Id.*, at 639. Section 8 of the Act of June 25, 1910, ch. 412, 36 Stat. 840, amended §47a(2) of the then Bankruptcy Act to give the trustee in bankruptcy, as to property coming into the custody of the bankruptcy court, the rights of a creditor holding a lien. Upon Holt's debtor's bankruptcy, the mortgagees claimed the sprinkler system.

Justice Holmes, writing for a unanimous Court, observed that before the amendment "Holt had a better title than the trustees would have got" and that the Court was of the opinion "that the Act should not be construed to impair it." 232 U. S., at 639. He went on:

> "We do not need to consider whether or how far in any event the constitutional power of Congress would have been limited. It is enough that the reasonable and usual interpretation of such statutes is to confine their effect, so far as may be, to property rights established after they were passed. . . . That is a familiar and natural

> mode of interpretation . . . . We are of opinion that [Holt's title] was not affected by the enactment of later date than the conditional sale. The opposite construction would not simply extend a remedy but would impute to the Act of Congress an intent to take away rights lawfully retained, and unimpeachable at the moment when they took their start." *Id.*, at 639–640.

The Court then ruled against the claim of the mortgagees because they had made no advance on the faith of the sprinkler system and were not purchasers for value as against Holt, and because removal "would not affect the integrity of the structure on which the mortgagees advanced." *Id.*, at 641.

Holt v. *Henley* thus also involved a pre-existing agreement, a subsequent change in the then Bankruptcy Act, and the Court's preservation of the pre-existing right. I see no way to distinguish that case from this one, and I would affirm the judgment of the Court of Appeals simply on the compelling authority of *Holt* v. *Henley*. See also *Auffm'ordt* v. *Rasin*, 102 U. S. 620, 622 (1881). I would much prefer to avoid in this way the dicta the Court enunciates with respect to "takings."

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All issues available have been filmed.
Unfortunately, any scattered missing issues are no longer available.

981 /81-202

(Slip Opinion)

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Lumber Co.*, 200 U. S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE ET AL. *v.* CLAIBORNE HARDWARE CO. ET AL.

CERTIORARI TO THE SUPREME COURT OF MISSISSIPPI

No. 81-202. Argued March 3, 1982—Decided July 2, 1982

In 1966, a boycott of white merchants in Claiborne County, Miss., was launched at a meeting of a local branch of the National Association for the Advancement of Colored People (NAACP) attended by several hundred black persons. The purpose of the boycott was to secure compliance by both civic and business leaders with a lengthy list of demands for equality and racial justice. The boycott was largely supported by speeches encouraging nonparticipants to join the common cause and by nonviolent picketing, but some acts and threats of violence did occur. In 1969, respondent white merchants filed suit in Mississippi Chancery Court for injunctive relief and damages against petitioners (the NAACP, the Mississippi Action for Progress, and a number of individuals who had participated in the boycott, including Charles Evers, the field secretary of the NAACP in Mississippi and a principal organizer of the boycott). Holding petitioners jointly and severally liable for all of respondents' lost earnings during a 7-year period from 1966 to the end of 1972 on three separate conspiracy theories, including the tort of malicious interference with respondents' business, the Chancery Court imposed damages liability and issued a permanent injunction. The Mississippi Supreme Court rejected two theories of liability but upheld the imposition of liability on the basis of the common-law tort theory. Based on evidence that fear of reprisals caused some black citizens to withhold their patronage from respondents' businesses, the court held that the entire boycott was unlawful and affirmed petitioners' liability for all damages "resulting from the boycott" on the ground that petitioners had *agreed* to use force, violence, and "threats" to effectuate the boycott.

Held:

1. The nonviolent elements of petitioners' activities are entitled to the

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protection of the First Amendment. Pp. 20–28.

(a) Through exercise of their First Amendment rights of speech, assembly, association, and petition, rather than through riot or revolution, petitioners sought to bring about political, social, and economic change. Pp. 20–25.

(b) While States have broad power to regulate economic activities, there is no comparable right to prohibit peaceful political activity such as that found in the boycott in this case. Pp. 25–28.

2. Petitioners are not liable in damages for the consequences of their nonviolent, protected activity. Pp. 29–34.

(a) While the State legitimately may impose damages for the consequences of violent conduct, it may not award compensation for the consequences of nonviolent, protected activity; only those losses proximately caused by the unlawful conduct may be recovered. Pp. 29–32.

(b) Similarly, the First Amendment restricts the ability of the State to impose liability on an individual solely because of his association with another. Civil liability may not be imposed merely because an individual belonged to a group, some members of which committed acts of violence. For liability to be imposed by reason of association alone, it is necessary to establish that the group itself possessed unlawful goals and that the individual held a specific intent to further those illegal aims. Pp. 32–34.

3. The award for all damages "resulting from the boycott" cannot be sustained, where the record discloses that all of the respondents' business losses were not proximately caused by violence or threats of violence. Pp. 34–46.

(a) To the extent that the Mississippi Supreme Court's judgment rests on the ground that "many" black citizens were "intimidated" by "threats" of "social ostracism, vilification, and traduction," it is flatly inconsistent with the First Amendment. The court's ambiguous findings are inadequate to assure the "precision of regulation" demanded by that Amendment. Pp. 34-38.

(b) Regular attendance and participation at the meetings of the Claiborne County Branch of the NAACP is an insufficient predicate on which to impose liability on the individual petitioners. Nor can liability be imposed on such individuals simply because they were either "store watchers" who stood outside the boycotted merchants' stores to record the names of black citizens who patronized the stores or members of a special group of boycott "enforcers." Pp 38–39.

(c) For similar reasons, the judgment against Evers cannot be separately justified, nor can liability be imposed upon him on the basis of speeches that he made, because those speeches did not incite violence or specifically authorize the use of violence. His acts, being insufficient to impose liability on him, may not be used to impose liability on the NAACP, his principal. Moreover, there is no finding that Evers or any other NAACP member had either actual or apparent authority from the NAACP to commit acts of violence or to threaten violent conduct or that the NAACP ratified unlawful conduct. To impose liability on the NAACP without such a finding would impermissibly burden the rights of political association that are protected by the First Amendment. Pp. 39–46.

393 So. 2d 1290, reversed and remanded.

STEVENS, J., delivered the opinion of the Court, in which BURGER, C. J., and BRENNAN, WHITE, BLACKMUN, POWELL, and O'CONNOR, JJ., joined. REHNQUIST, J., concurred in the result. MARSHALL, J., took no part in the consideration or decision of the case.

Syllabus

[illegible]

[illegible]

[illegible] Civil liability may not be imposed merely because an individual belonged to a group, some members of which committed acts of violence. For liability to be imposed by reason of association alone, it is necessary to establish that the group itself possessed unlawful goals and that the individual held a specific intent to further those illegal aims. Pp. [illegible].

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(c) For similar reasons, the judgment against Evers cannot be separately justified, nor can liability be imposed upon him on the basis of speeches that he made. [illegible]

NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D.C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

SUPREME COURT OF THE UNITED STATES

No. 81–202

NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, ET AL., PETITIONERS *v.* CLAIBORNE HARDWARE COMPANY ET AL.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSISSIPPI

[July 2, 1982]

JUSTICE STEVENS delivered the opinion of the Court.

The term "concerted action" encompasses unlawful conspiracies and constitutionally protected assemblies. The "looseness and pliability" of legal doctrine applicable to concerted action led Justice Jackson to note that certain joint activities have a "chameleon-like" character.[1] The boycott of white merchants in Claiborne County, Mississippi, that gave rise to this litigation had such a character; it included elements of criminality and elements of majesty. Evidence that fear of reprisals caused some black citizens to withhold their patronage from respondents' businesses convinced the Supreme Court of Mississippi that the entire boycott was unlawful and that each of the 92 petitioners was liable for all of its economic consequences. Evidence that persuasive rhetoric, determination to remedy past injustices, and a host of voluntary decisions by free citizens were the critical factors in the boycott's success presents us with the question whether the State Court's judgment is consistent with the Constitution of the United States.

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[1] See *Krulewitch* v. *United States*, 336 U. S. 440, 447–449 (concurring opinion).

I

In March 1966, black citizens of Port Gibson, Mississippi and other areas of Claiborne County presented white elected officials with a list of particularized demands for racial equality and integration.[2] The complainants did not receive a satisfactory response and, at a local NAACP meeting at the First Baptist Church, several hundred black persons voted to place a boycott on white merchants in the area. On October 31, 1969, several of the merchants filed suit in state court to recover losses caused by the boycott and to enjoin future boycott activity. We recount first the course of that litigation and then consider in more detail the events that gave rise to the merchants' claim for damages.

A

The complaint was filed in the Chancery Court of Hinds County by 17 white merchants.[3] The merchants named two corporations and 146 individuals as defendants: the National Association for the Advancement of Colored People (NAACP), a New York membership corporation; Mississippi Action for Progress (MAP), a Mississippi corporation that implemented the federal "Head Start" program; Aaron Henry, the President of the Mississippi Branch of the NAACP;

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[2] Port Gibson is the county seat and largest municipality in Claiborne County.

[3] The affected businesses represented by the merchants included four grocery stores, two hardware stores, a pharmacy, two general variety stores, a laundry, a liquor store, two car dealers, two auto parts stores, and a gas station. Many of the owners of these boycotted stores were civic leaders in Port Gibson and Claiborne County. Respondents Allen and Al Batten were aldermen in Port Gibson, R. 15111; Robert Vaughan, part owner and operator of one of the boycotted stores, represented Claiborne County in the Mississippi House of Representatives, R. 15160; respondents Abraham and Hay had served on the school board, R. 14906, 14678; respondent Hudson served on the Claiborne County Democratic Committee, R. 840.

Charles Evers, the Field Secretary of the NAACP in Mississippi; and 144 other individuals who had participated in the boycott.[4] The complaint sought injunctive relief and an attachment of property, as well as damages. Although it alleged that the plaintiffs were suffering irreparable injury from an ongoing conspiracy, no preliminary relief was sought.

Trial began before a chancellor in equity on June 11, 1973.[5] The court heard the testimony of 144 witnesses during an eight-month trial. In August 1976, the chancellor issued an opinion and decree finding that "an overwhelming preponderance of the evidence" established the joint and several liability of 130 of the defendants on three separate conspiracy theories.[6] First, the court held that the defendants were liable for the tort of malicious interference with the plaintiffs' businesses, which did not necessarily require the presence of a conspiracy.[7] Second, the chancellor found a violation of a

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[4] The complaint also named 52 banks as "attachment defendants." The banks answered that the NAACP had $16,800 on deposit in Mississippi.

[5] As a result of the plaintiffs' prayer for an attachment in equity, jurisdiction existed in chancery court. The trial judge ruled: "It was incumbent upon this court to hear the case in full once jurisdiction was assumed. To have heard the portions of this matter sounding in equity, only, and to have transferred the questions of tort liability and damages to the circuit court would have been contrary to the maxim 'equity delights to do complete justice, and not by halves.'" App. to Pet. for Cert. 56b. The defendants thus were denied a jury trial on the liability issues. Although the court recognized that it had power to empanel a jury, it declined to exercise its discretion to do so. *Ibid.* The Mississippi non-resident attachment statute that provided the basis for equitable jurisdiction has since been declared unconstitutional by both federal district courts in Mississippi. *MPI Inc.* v. *McCullough*, 463 F. Supp. 887 (ND Miss. 1978); *Mississippi Chem. Corp.* v. *Chemical Constr. Corp.*, 444 F. Supp. 925 (SD Miss. 1977).

Commencement of trial was delayed by collateral proceedings in federal court. See *Henry* v. *First National Bank of Clarksdale*, 50 F.R.D. 251 (ND Miss. 1970), *rev'd*, 444 F. 2d 1300 (CA5 1971), *cert. denied*, 405 U. S. 1019. The District Court entered a preliminary injunction restraining the state proceedings on the theory that the merchants sought to infringe the defendants' First Amendment rights. The Court of Appeals reversed, holding that the mere commencement of a private tort suit did not itself involve "state action" for purposes of 28 U. S. C. § 1343(3).

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[6] App. to Pet. for Cert. 2g. Of the original 148 named defendants, 16 were dismissed by stipulation of counsel (12 had died, two were minors, one was *non compos mentis*, and one—the Reverend Dominic Cangemi—was dismissed by agreement without explanation). One defendant was dismissed because he had been misidentified in the complaint. The chancellor dismissed one defendant—state NAACP leader Aaron Henry—because "the complainants failed to meet the burden of proof as to [his] wrongdoing." *Id.*, at 28b. Thus, except for the defendants dismissed by stipulation, the plaintiffs prevailed on the merits in the trial court against all but one of the defendants.

[7] Although the bulk of the court's discussion of the defendants' common law tort liability focused on the presence of a civil conspiracy, the chancellor did not appear to hold that a concerted refusal to deal—without more—was actionable under the common law of Mississippi. The court apparently based its first theory of liability on the ground that the "malicious interference by the defendants with the businesses of the complainants as shown by the evidence in this case is tortious *per se*, and this would be true even without the element of conspiracy." *Id.*, at 42b. (footnote omitted). In Mississippi, "[e]ither an individual or a corporation, whether acting in conjunction with others, or not," may be liable in an action for "malicious interference with a trade or calling." *Memphis Laundry-Cleaners* v. *Lindsey*, 192 Miss. 224, 239 (1941). The chancellor in this case stated that the necessary element of malice is established by proof of "the intentional performance of an act harmful to another without just or lawful cause or excuse." App. to Pet. for Cert. 42b, n. 8.

The repeated references to the presence of a conspiracy might be explained by the court's finding that each of the defendants—with the exception of Aaron Henry—was jointly and severally liable for the plaintiffs' losses. As noted, an element of the plaintiffs' common law action was the defendants' intentional performance of an "unprivileged" act harmful to another. The chancellor stated that the evidence clearly established that "certain defendants" had committed "overt acts which were injurious to the trade and business of complainants." *Id.*, at 39b. The court continued: "Where two or more persons conspire together, the conspiracy makes the wrongful act of each person the joint acts of them all," *id.*, at 41b; "[i]t follows that each act done in pursuance of the conspiracy by one of the sevstate statutory prohibition against secondary boycotts, on the theory that the defendants' primary dispute was with the governing authorities of Port Gibson and Claiborne County and not with the white merchants at whom the boycott was directed.[8] Third, the court found a violation of Mississippi's antitrust statute, on the ground that the boycott had diverted black patronage from the white merchants to black merchants and to other merchants located out of Claiborne County and thus had unreasonably limited competition between black and white merchants that had traditionally existed.[9] The chancellor specifically rejected the defendants' claim that their conduct was protected by the First Amendment.[10]

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eral conspirators is, in contemplation of the law, an act for which each is jointly and severally liable." *Ibid.* Thus, the presence of a conspiracy rendered all of the "conspirators" liable for the wrongful acts of any member of that conspiracy.

[8] See Miss. Code Ann. § 97-23-85. The chancellor found: "The testimony in the case at bar clearly shows that the principal objective of the boycott was to force the white merchants of Port Gibson and Claiborne County to bring pressure upon governing authorities to grant defendants' demands or, in the alternative, to suffer economic ruin." App. to Pet. for Cert. 51b. As noted, however, many of the merchants themselves were civic leaders. See n. 3, *supra.*

[9] See Miss. Code Ann. § 75-21-9. The court made clear that under this theory intentional participation in the concerted action rendered each defendant directly liable for all resulting damages. "As a legal principle, it is sufficient to show that the concert of action on the part of the defendants was deliberately invited, and that the defendants gave their adherence to the scheme and participated in it." App. to Pet. for Cert. 54b. The same was true of the court's secondary boycott theory; "since an illegal boycott is an invasion of a property right, the members of the boycotting combination are liable for the resulting damages." *Id.*, at 53b.

[10] In its discussion of the secondary boycott statute, the court rejected an argument that the statute was unconstitutional under the First and Fourteenth Amendments. Noting as a "basic premise" that "secondary boycotts are unlawful under both United States and Mississippi law," the court stated that "conduct and communication which are illegal are not protected

Five of the merchants offered no evidence of business losses. The chancellor found that the remaining 12 had suffered lost business earnings and lost good will during a seven-year period from 1966 to 1972 amounting to $944,699. That amount, plus statutory antitrust penalties of $6,000 and a $300,000 award of attorney's fees, produced a final judgment of $1,250,699, plus interest from the date of judgment and costs. As noted, the chancellor found all but 18 of the original 148 defendants jointly and severally liable for the entire judgment. The court justified imposing full liability on the national organization of the NAACP on the ground that it had failed to "repudiate" the actions of Charles Evers, its Field Secretary in Mississippi.

In addition to imposing damage liability, the chancellor entered a broad permanent injunction. He permanently enjoined petitioners from stationing "store watchers" at the respondents' business premises; from "persuading" any person to withhold his patronage from respondents; from "using demeaning and obsence language to or about any person" because that person continued to patronize the respondents; from "picketing or patroling" the premises of any of the respondents; and from using violence against any person or inflicting damage to any real or personal property.[11]

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by the constitutional provisions relating to freedom of speech." *Id.*, at 46b. In imposing liability under the state restraint of trade statute, the chancellor added: "After a careful consideration of the constitutional claims of defendants, the Court finds that none of the acts or conduct of defendants was shielded or protected by the Constitution of the United States or the Constitution of the State of Mississippi." *Id.*, at 56b. Finally, in assessing damages, the court stated: "Defendants base their defense on the concept that the right to boycott and inflict losses on complainants was a legally protected right afforded them under the laws and Constitution of the United States. This Court has hereinbefore found that the conduct of the defendants was unlawful and unprotected." *Id.*, at 62b.

[11] *Id.*, at 19g. Following the entry of judgment, the defendants moved for relief from Mississippi's 125 percent supersedeas bonding requirement. Although the Mississippi Supreme Court denied the motion, a federal court

In December 1980, the Mississippi Supreme Court reversed significant portions of the trial court's judgment. It held that the secondary boycott statute was inapplicable because it had not been enacted until "the boycott had been in operation for upward of two years."[12] The court declined to rely on the restraint of trade statute, noting that the "United States Supreme Court has seen fit to hold boycotts to achieve political ends are not a violation of the Sherman Act, 15 U. S. C. § 1 (1970), after which our statute is patterned."[13] Thus, the court rejected two theories of liability that were consistent with a totally voluntary and nonviolent withholding of patronage from the white merchants.

The Mississippi Supreme Court upheld the imposition of liability, however, on the basis of the chancellor's common law tort theory. After reviewing the chancellor's recitation of the facts, the court quoted the following finding made by the trial court:

> "In carrying out the agreement and design, certain of the defendants, acting for all others, engaged in acts of physical force and violence against the persons and property of certain customers and prospective customers. Intimidation, threats, social ostracism, vilification, and traduction were some of the devices used by the defendants to achieve the desired results. Most effective, also, was the stationing of guards ('enforcers,' 'deacons,' or 'black hats') in the vicinity of white-owned businesses. Unquestionably, the evidence shows that the volition of many black persons was overcome out of sheer fear, and they were forced and compelled against their personal wills to withhold their trade and business intercourse

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enjoined execution of the chancery court judgment pending appeal. *Henry* v. *First National Bank*, 424 F. Supp. 633 (ND Miss. 1976), *aff'd*, 595 F. 2d 291 (CA5 1979), *cert. denied*, 444 U. S. 1074.

[12] App. to Pet. for Cert. 22a.

[13] *Ibid.*

> from the complainants." App. to Pet. for Cert. 39b (quoted *id.*, at 20a).

On the basis of this finding, the court concluded that the entire boycott was unlawful. "If any of these factors—force, violence, or threats—is present, then the boycott is illegal regardless of whether it is primary, secondary, economical, political, social or other."[14] In a brief passage, the court rejected petitioners' reliance on the First Amendment:

> "The agreed use of illegal force, violence, and threats against the peace to achieve a goal makes the present state of facts a conspiracy. We know of no instance, and our attention has been drawn to no decision, wherein it has been adjudicated that free speech guaranteed by the First Amendment includes in its protection the right to commit crime." *Id.*, at 23a.

The theory of the Mississippi Supreme Court, then, was that petitioners had *agreed* to use force, violence, and "threats" to effectuate the boycott.[15] To the trial court, such a finding had not been necessary.[16]

Although the Mississippi Supreme Court affirmed the chancellor's basic finding of liability, the court held that respondents "did not establish their case" with respect to 38 of the defendants.[17] The court found that MAP was a victim, rather than a willing participant, in the conspiracy and dismissed—without further explanation—37 individual defendants for lack of proof. Finally, the court ruled that certain damages had been improperly awarded and that other damages had been inadequately proved. The court remanded for further proceedings on the computation of damages.[18]

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[14] *Id.*, at 23a.

[15] The court did not specifically identify the evidence linking any of the defendants to such an agreement.

[16] As noted, liability under the secondary boycott and restraint of trade statutes could be found on the basis of an entirely voluntary and nonviolent agreement to withhold patronage. See n. 9, *supra*. It is not clear whether—in its imposition of tort liability—the trial court rested on a theory similar to that ultimately advanced by the Mississippi Supreme Court. In finding an unlawful civil conspiracy—which rendered each conspirator liable for the actions of others, see n. 7, *supra*—the chancellor arguably believed that it was necessary to connect all defendants to an agreement to use force or violence to effectuate the conspiracy. See *id.*, at 40b-41b. The chancellor made no factual finding, however, that such an agreement existed.

We granted a petition for certiorari. —— U. S. ——. At oral argument, a question arose concerning the factual basis for the judgment of the Mississippi Supreme Court. As noted, that court affirmed petitioners' liability for damages on the ground that each of the petitioners had agreed to effectuate the boycott through force, violence, and threats. Such a finding was not necessary to the trial court's imposition of liabilty and neither state court had identified the evidence actually linking the petitioners to such an agreement. In response to a request from this Court, respondents filed a supplemental brief "specifying the acts committed by each of the petitioners giving rise to liability for damages." Respondents' Supplemental Brief 1. That brief helpfully places the petitioners in different categories; we accept respondents' framework for analysis and identify these classes as a preface to our review of the relevant incidents that occurred during the seven-year period for which damages were assessed.[19]

First, respondents contend that liability is justified by evidence of participation in the "management" of the boycott.[20] Respondents identify two groups of persons who may be found liable as "managers": 79 individuals who regularly attended Tuesday night meetings of the NAACP at the First Baptist Church; and 11 persons who took "leadership roles" at those meetings.[21]

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[17] *Id.*, at 26a.

[18] Concerning the permanent injunction entered by the chancellor, the court stated: "Although the granting of injunction has been assigned as error, the error has not been argued, and NAACP, et al. say, at the conclusion of their brief '. . . the injunctive aspects of the case are now moot. . . .'" *Id.*, at 5a. Despite this finding, the court did not vacate the injunction.

[19] Respondents acknowledge that "[t]he basis on which the Mississippi Supreme Court held that petitioners were liable for damages was 'the agreed use of illegal force, violence and threats.'" Respondents' Supplemental Brief 1-2.

Second, respondents contend that liability is justified by evidence that an individual acted as a boycott "enforcer."[22] In this category, respondents identify 22 persons as members of the "Black Hats"—a special group organized during the boycott—and 19 individuals who were simply "store watchers."

Third, respondents argue that those petitioners "who themselves engaged in violent acts or who threatened violence have provided the best possible evidence that they wanted the boycott to succeed by coercion whenever it could not succeed by persuasion." *Id.*, at 10. They identify 16 individuals for whom there is direct evidence of participation in what respondents characterize as violent acts or threats of violence.

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[20] Respondents argue that anyone "who participates in the decisionmaking functions of an enterprise, with full knowledge of the tactics by which the enterprise is being conducted, manifests his assent to those tactics. . . ." *Id.*, at 2. Respondents thus would impose liability for the managers' *failure* to act; respondents argue that, despite evidence that boycott "enforcers" caused fear of injury to persons and property, "they were not taken from their posts and replaced by a system of voluntary compliance; there is no evidence that any of the petitioners ever admonished them for their enforcement methods; the successful system of paramilitary enforcers on the streets and 'rhetorical' threats of violence by boycott leaders was left in place for the duration." *Id.*, at 5.

[21] These groups are not meant to be exclusive.

[22] "Once the pattern had been established—warnings to prospective customers, destruction of goods purchased at boycotted stores, public displays of weapons and military discipline, denunciation of names gathered by the store-watchers, and subsequent violence against the persons and property of boycott breakers—store-watching in Port Gibson became the sort of activity from which a court could reasonably infer an intention to frighten people away from the stores." *Id.*, at 8.

Fourth, respondents contend that Charles Evers may be held liable because he "threatened violence on a number of occasions against boycott breakers." *Id.*, at 13. Like the chancellor, respondents would impose liability on the national NAACP because Evers "was acting in his capacity as Field Secretary of the NAACP when he committed these tortious and constitutionally unprotected acts." *Ibid.*

Finally, respondents state that they are "unable to determine on what record evidence the state courts relied in finding liability on the part of seven of the petitioners." *Id.*, at 16. With these allegations of wrongdoing in mind, we turn to consider the factual events that gave rise to this controversy.

B

The chancellor held petitioners liable for all of respondents' lost earnings during a seven-year period from 1966 to December 31, 1972. We first review chronologically the principal events that occurred during that period, describe some features of the boycott that are not in dispute, and then identify the most significant evidence of violent activity.

In late 1965 or early 1966, Charles Evers, the Field Secretary of the NAACP, helped organize the Claiborne County Branch of the NAACP. The pastor of the First Baptist Church, James Dorsey, was elected president of the Branch; regular meetings were conducted each Tuesday evening at the Church. At about the same time, a group of black citizens formed a Human Relations Committee and presented a petition for redress of grievances to civic and business leaders of the white community. In response, a biracial committee—including five of the petitioners and several of the respondents—was organized and held a series of unproductive meetings.

The black members of the committee then prepared a further petition entitled "Demands for Racial Justice." This petition was presented for approval at the local NAACP meeting conducted on the first Tuesday evening in March. As described by the chancellor, "the approximately 500 people present voted their approval unanimously."[23] On March 14, 1966, the petition was presented to public officials of Port Gibson and Claiborne County.

The petition included 19 specific demands. It called for the desegregation of all public schools and public facilities, the hiring of black policemen, public improvements in black residential areas, selection of blacks for jury duty, integration of bus stations so that blacks could use all facilities, and an end to verbal abuse by law enforcement officers. It stated that "Negroes are not to be addressed by terms as 'boy,' 'girl,' 'shine,' 'uncle,' or any other offensive term, but as 'Mr.,' 'Mrs.,' or Miss,' as is the case with other citizens."[24] As described by the chancellor, the purpose of the demands "was to gain equal rights and opportunities for Negro citizens."[25] The petition further provided that black leaders hoped it would not be necessary to resort to the "selective buying campaigns" that had been used in other communities.[26] On March 23, two demands that had been omitted from the original petition were added, one of which provided: "All stores must employ Negro clerks and cashiers."[27] This supplemental petition stated that a response was expected by April 1.

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[23] App. to Pet. for Cert. 15b.

[24] *Id.*, at 10b.

[25] *Id.*, at 12b.

[26] The petition stated:

"We hope it will not be necessary to resort to the kind of peaceful demonstrations and selective buying campaigns which have had to be used in other communities. It takes manpower, time and energy which could be better directed at solving these problems which exist in Port Gibson and Claiborne County by mutual cooperation and efforts at tolerant understanding.

"No one likes to have to resort to picketing and other kinds of demonstration—just as no one likes to be the target of this kind of demonstration. But this sort of thing is inevitable unless there can be real progress toward giving all citizens their equal rights. There seems sometimes to be no other alternative.

A favorable response was not received. On April 1, 1966, the Claiborne County NAACP conducted another meeting at the First Baptist Church. As described by the chancellor:

> "Several hundred black people attended the meeting, and the purpose was to decide what action should be taken relative to the twenty-one demands. Speeches were made by Evers and others, and a vote was taken. It was the unanimous vote of those present, without dissent, to place a boycott on the white merchants of Port Gibson and Claiborne County." App. to Pet. for Cert. 15b.

The boycott was underway.[28]

In September 1966, Mississippi Action for Progress, Inc. (MAP) was organized to develop community action programs in 20 counties of Mississippi. One of MAP's programs—known as Head Start—involved the use of federal funds to

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"Objectives of Negro citizens of Port Gibson and Claiborne County are, simply put, to have equality of opportunity, in every aspect of life, and to end the white supremacy which has pervaded community life. This implies many long-range objectives such as participation in decision-making at every level of community, civic, business and political affairs." *Id.*, at 9b.

[27] *Id.*, at 13b.

[28] Although Evers' speech on April 1, 1966 was not recorded, the chancellor found: "Evers told his audience that they would be watched and that blacks who traded with white merchants would be *answerable to him.* According to Sheriff Dan McKay, who was present during the speech, Evers told the assembled black people that any 'uncle toms' who broke the boycott would 'have their necks broken' by their own people. Evers' remarks were directed to all 8,000-plus black residents of Claiborne County, and not merely the relatively few members of the Claiborne NAACP." *Id.*, at 17b-18b (footnote omitted).

provide food for young children. Originally, food purchases in Claiborne County were made alternately from white-owned and black-owned stores, but in February 1967 the directors of MAP authorized their Claiborne County representatives to purchase food only from black-owned stores. Since MAP bought substantial quantities of food, the consequences of this decision were significant. A large portion of the trial was devoted to the question whether MAP participated in the boycott voluntarily and—under the chancellor's theories of liability—could be held liable for the resulting damages. The chancellor found MAP a willing participant, noting that "during the course of the trial, the only Head Start cooks called to the witness stand testified that they refused to go into white-owned stores to purchase groceries for the children in the program *for the reason that they were in favor of the boycott and wanted to honor it.*"[29]

Several events occurred during the boycott that had a strong effect on boycott activity. On February 1, 1967, Port Gibson employed its first black policeman. During that month, the boycott was lifted on a number of merchants. On April 4, 1968, Dr. Martin Luther King, Jr. was assassinated in Memphis. The chancellor found that this tragic event had a depressing effect on the black community and, as a result, the boycott "tightened."[30]

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[29] *Id.*, at 22b (emphasis in original). The chancellor also noted that MAP's Board of Directors "did not seek help from local law-enforcement officers, nor did they complain to United States authorities for protection of their cooks from possible reprisals arising from trade with the white merchants"; and that "MAP employees in Claiborne County continued to take an active part in the NAACP activities and to support the boycott by picketing and marching." *Id.*, at 23b. The Mississippi Supreme Court rejected the chancellor's findings and concluded that MAP was not a willing participant in the boycott, thus absolving it from liability.

[30] *Id.*, at 25b. One of the respondents awarded the most in damages, Barbara Ellis—a partner in Ellis Variety Store—testified that the store was boycotted from April 1, 1966 until January 27, 1967. On the latter date,

One event that occurred during the boycott is of particular significance. On April 18, 1969, a young black man named Roosevelt Jackson was shot and killed during an encounter with two Port Gibson police officers.[31] Large crowds immediately gathered, first at the hospital and later at the church. Tension in the community neared a breaking point. The local police requested reinforcements from the State Highway Patrol and sporadic acts of violence ensued. The Mayor and Board of Aldermen placed a dawn to dusk curfew into effect.

On April 19, Charles Evers spoke to a group assembled at the First Baptist Church and led a march to the courthouse where he demanded the discharge of the entire Port Gibson Police Force. When this demand was refused, the boycott was reimposed on all white merchants. One of Evers' speeches on this date was recorded by the police. In that speech—significant portions of which are reproduced in an appendix to this opinion—Evers stated that boycott violators would be "disciplined" by their own people and warned that the sheriff could not sleep with boycott violators at night.

On April 20, Aaron Henry came to Port Gibson, spoke to a large gathering, urged moderation, and joined local leaders in a protest march and a telegram sent to the Attorney General of the United States. On April 21, Evers gave another speech to several hundred people, in which he again called for a discharge of the police force and for a total boycott of all white-owned businesses in Claiborne County. Although this speech was not recorded, the chancellor found that Evers

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the store agreed—apparently at the urging of a biracial committee—to hire a black cashier. R. 1183. The boycott was reimposed on April 17, 1968, after the death of Martin Luther King, Jr., but again was lifted on May 1, 1968. R. 1184. The boycott finally was reimposed on April 19, 1969, the day following the shooting of Roosevelt Jackson. *Ibid.*

[31] The officers had gone to Jackson's home to arrest him. A scuffle ensued and Jackson was shot by a white officer allegedly while being held by a black officer.

stated: "If we catch any of you going in any of them racist stores, we're gonna break your damn neck."[28]

As noted, this lawsuit was filed in October 1969. No significant events concerning the boycott occurred after that time. The chancellor identified no incident of violence that occurred after the suit was brought. He did identify, however, several significant incidents of boycott-related violence that occurred some years earlier.

Before describing that evidence, it is appropriate to note that certain practices generally used to encourage support for the boycott were uniformly peaceful and orderly. The few marches associated with the boycott were carefully controlled by black leaders. Pickets used to advertise the boycott were often small children. The police made no arrests—and no complaints are recorded—in connection with the picketing and occasional demonstrations supporting the boycott. Such activity was fairly irregular, occurred primarily on weekends, and apparently was largely discontinued around the time the lawsuit was filed.[29]

One form of "discipline" of black persons who violated the boycott appears to have been employed with some regularity. Individuals stood outside of boycotted stores and identified those who traded with the merchants. Some of these "store watchers" were members of a group known as the "Black Hats" or the "Deacons."[34] The names of persons who violated the boycott were read at meetings of the Claiborne County NAACP and published in a mimeographed paper entitled the "Black Times." As stated by the chancellor, those persons "were branded as traitors to the black cause, called demeaning names, and socially ostracized for merely trading with whites."[35]

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[28] *Id.*, at 27b.

[29] R. 1146. The sheriff of Claiborne County testified: "There were pickets off and on from April, 1966 to 1970." R. 1060. When asked to describe "how they conducted themselves, what they did, what they went about doing," he stated: "Most of them carried or either had signs on their shoulders and they walked up and down the streets in front of the stores. They wouldn't always picket the same stores at the same time. At different times they might picket M&M then they would move up and picket Claiborne Hardware down Market Street to other businesses. Most of the time it was teenagers and at the last it was little bitty fellows, as young as about six years old. That was '69 and '70." *Ibid.* The sheriff also testified that the boycott was "tight" in April of 1966, April of 1968, and April of 1969. R. 1152.

The chancellor also concluded that a quite different form of discipline had been used against certain violators of the boycott. He specifically identified ten incidents that "strikingly" revealed the "atmosphere of fear that prevailed among blacks from 1966 until 1970."[36] The testimony concerning four incidents convincingly demonstrates that they occurred because the victims were ignoring the boycott. In two cases, shots were fired at a house; in a third, a brick was thrown through a windshield; in the fourth, a flower garden was damaged. None of these four victims, however, ceased trading with white merchants.[37]

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[34] Evidence concerning the aims and practices of the "Black Hats" is contradictory. Respondents describe them as a "paramilitary organization." Petitioner Elmo Scott, a member of the group, testified concerning instructions that were given to him: "It was given to the Deacons to give respect to the people that was on the street and, regardless of what they say back to you, for you not to use bad language to them or not to curse them or no kind of way, just talk to them in the right manner of way." R. 2985. It is undisputed that the "Black Hats" were formed during the boycott, that members of the organization engaged in "store watching" and other "enforcement" activities, and that some individuals who belonged to the group committed acts of violence.

[35] App. to Pet. for Cert. 19b.

[36] *Id.*, at 35b.

[37] On August 22, 1966, birdshot was fired into the home of James Gilmore, a black man who ignored the boycott. He immediately grabbed a shotgun, leapt into his car, pursued the vehicle from which he believed the shots had come, forced it to the side of the road, and apprehended three young black men who were active supporters of the boycott. They were

The evidence concerning four other incidents is less clear, but again it indicates that an unlawful form of discipline was applied to certain boycott violators. In April 1966, a black couple named Cox asked for a police escort to go into a white-owned dry cleaner and, a week later, shots were fired into their home. In another incident, an NAACP member took a bottle of whiskey from a black man who had purchased it in a white-owned store. The third incident involved a fight between a commercial fisherman who did not observe the boycott and four men who "grabbed me and beat me up and took a gun off me."[38] In a fourth incident, described only in hearsay testimony, a group of young blacks apparently pulled down the overalls of an elderly brick mason known as "Preacher White" and spanked him for not observing the boycott.[39]

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indicted, tried, and convicted, but the convictions were set aside on appeal. *Whitney* v. *State*, 205 So. 2d 284 (Miss. 1967). Gilmore continued to patronize white merchants after the incident.

In June 1966, while Murriel Cullens was having a beer in Wolf's Store, a brick was thrown through the windshield of his parked car. He had been patronizing white merchants and continued to do so thereafter. R. 14049. In November 1966, shotgun pellets were fired into the wall of his mother's home. She had received a number of threatening telephone calls criticizing her for patronizing white stores. She continued to do so after the indicent. R. 14003. At trial, Laura Cullens testified, in response to a question whether she had been scared: "No indeed. I haven't had a bone in me scared in my life from nobody. And I have always told them, they say, 'You're just an uncle tom.' And I say, 'Well, uncle tom can be blue, black, green or purple or white. If I feel I am in the right, I stand in that right and nobody tells me what to do.'" R. 14017.

James Bailey, who was a teenager at the time of the incident, testified that he had noticed that an elderly black lady named Willie Butler traded with a white merchant and had groceries delivered to her home. He testified that he destroyed flowers in her garden to punish her for violating the boycott. R. 3656. He stated that he acted on his own initiative and that Mrs. Butler continued to trade with the merchant. R. 3660, 3741.

[38] R. 13868. One of his assailants testified that the incident resulted from an automobile accident, rather than the boycott. R. 3656.

[39] "Preacher White" had died by the time of trial. No witness admitted

Two other incidents discussed by the chancellor are of less certain significance. Jasper Coleman testified that he participated in an all-night poker game at a friend's house on Christmas Eve 1966. The following morning he discovered that all four tires of his pick-up truck had been slashed with a knife. Coleman testified that he did not participate in the boycott but was never threatened for refusing to do so. R. 13791. Finally, Willie Myles testified that he and his wife received a threatening phone call and that a boy on a barge told him that he would be whipped for buying his gas at the wrong place.

Five of these incidents occurred in 1966. The other five are not dated. The chancellor thus did not find that any act of violence occurred after 1966.[40] In particular, he made no reference to any act of violence or threat of violence—with the exception, of course, of Charles Evers' speeches—after the shootings of Martin Luther King, Jr. in 1968 or Roosevelt Jackson in 1969. The chancellor did not find that any of the incidents of violence was discussed at the Tuesday evening

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being present at what respondents' counsel characterized as "the spanking of Preacher White." R. 3696. The Port Gibson Chief of Police testified, however, that White had come in and complained that a group of young blacks had pulled his overalls down and whipped him. R. 2176. In describing this incident, the chancellor stated that Preacher White "was stripped of his clothing and whipped by a group of young blacks because he refused to honor the boycott." App. to Pet. for Cert. 37b.

[40] In describing the "atmosphere of fear" existing during the boycott, the chancellor emphasized the participation of petitioner Rudy Shields. He stated:

> "Defendant Rudolph J. (Rudy) Shields, formerly of Chicago, was the principal figure in several altercations. He boasted that he was 'the most jailed person in the Claiborne County boycott.' This man was the acknowledged leader of the 'Deacons.'" *Id.*, at 35b.

See also Respondents' Supplemental Brief 10–13. The record indicates that Shields was in Port Gibson for approximately eight months during 1966. R. 4993.

meetings of the NAACP.[41]

II

This Court's jurisdiction to review the judgment of the Mississippi Supreme Court is, of course, limited to the federal questions necessarily decided by that court.[42] We consider first whether petitioners' activities are protected in any respect by the Federal Constitution and, if they are, what effect such protection has on a lawsuit of this nature.

A

The boycott of white merchants at issue in this case took many forms. The boycott was launched at a meeting of a local branch of the NAACP attended by several hundred persons. Its acknowledged purpose was to secure compliance by both civic and business leaders with a lenghty list of demands for equality and racial justice. The boycott was supported by speeches and nonviolent picketing. Participants repeatedly encouraged others to join in its cause.

Each of these elements of the boycott is a form of speech or conduct that is ordinarily entitled to protection under the First and Fourteenth Amendments.[43] The black citizens named as defendants in this action banded together and collectively expressed their dissatisfaction with a social structure that had denied them rights to equal treatment and respect. As we so recently acknowledged in *Citizens Against Rent Control* v. *Berkeley*, —— U. S. ——, ——, "the practice of persons sharing common views banding together to achieve a common end is deeply embedded in the American political process." We recognized that "by collective effort individuals can make their views known, when, individually, their voices would be faint or lost." *Ibid.* In emphasizing "the importance of freedom of association in guaranteeing the right of people to make their voices heard on public issues," *ibid.*, we noted the words of Justice Harlan, writing for the Court in *NAACP* v. *Alabama*, 357 U. S. 449, 460:

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[41] The chancellor did find—and apparently believed this fact to be significant—that the NAACP provided attorneys to black persons arrested in connection with acts arising from the boycott. App. to Pet. for Cert. 38b. The NAACP provided legal representation to the three black persons arrested in August 1966 following the Gilmore shooting.

[42] Although the Mississippi Supreme Court remanded for a recomputation of damages, its judgment is final for purposes of our jurisdiction. See *Cox Broadcasting* v. *Cohn*, 420 U. S. 469, 480.

[43] "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." U. S. Const., Amdt. I. First Amendment freedoms are protected by the Fourteenth Amendment from invasion by the States. *Edwards* v. *South Carolina*, 372 U. S. 229, 235.

> "Effective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association, as this Court has more than once recognized by remarking upon the close nexus between the freedoms of speech and assembly."

THE CHIEF JUSTICE stated for the Court in *Citizens Against Rent Control*: "There are, of course, some activities, legal if engaged in by one, yet illegal if performed in concert with others, but political expression is not one of them." —— U. S., at ——.

The right to associate does not lose all constitutional protection merely because some members of the group may have participated in conduct or advocated doctrine that itself is not protected. In *De Jonge* v. *Oregon*, 299 U. S. 353, the Court unanimously held that an individual could not be penalized simply for assisting in the conduct of an otherwise lawful meeting held under the auspices of the Communist Party, an organization that advocated "criminal syndicalism." After reviewing the rights of citizens "to meet peaceably for consultation in respect to public affairs and to petition for a redress of grievances," *id.*, at 364, Chief Justice Hughes, writing for the Court, stated:

> "It follows from these considerations that, consistently with the Federal Constitution, peaceable assembly for lawful discussion cannot be made a crime. The holding of meetings for peaceable political action cannot be proscribed. Those who assist in the conduct of such meetings cannot be branded as criminals on that score. The question, if the rights of free speech and peaceable assembly are to be preserved, is not as to the auspices under which the meeting is held but as to its purpose; not as to the relations of the speakers, but whether their utterances transcend the bounds of the freedom of speech which the Constitution protects. If the persons assembling have committed crimes elsewhere, if they have formed or are engaged in a conspiracy against the public peace and order, they may be prosecuted for their conspiracy or other violation of valid laws. But it is a different matter when the State, instead of prosecuting them for such offenses, seizes upon mere participation in a peaceable assembly and a lawful public discussion as the basis for a criminal charge." *Id.*, at 365.

Of course, the petitioners in this case did more than assemble peaceably and discuss among themselves their grievances against governmental and business policy. Other elements of the boycott, however, also involved activities ordinarily safeguarded by the First Amendment. In *Thornhill* v. *Alabama*, 310 U. S. 88, the Court held that peaceful picketing was entitled to constitutional protection, even though, in that case, the purpose of the picketing "was concededly to advise customers and prospective customers of the relationship existing between the employer and its employees and thereby to induce such customers not to patronize the employer." *Id.*, at 99. Cf. *Chauffeurs Union* v. *Newell*, 356 U. S. 341. In *Edwards* v. *South Carolina*, 372 U. S. 229, we held that a peaceful march and demonstration was protected by the rights of free speech, free assembly, and freedom to petition for a redress of grievances.

Speech itself also was used to further the aims of the boycott. Nonparticipants repeatedly were urged to join the common cause, both through public address and through personal solicitation. These elements of the boycott involve speech in its most direct form. In addition, names of boycott violators were read aloud at meetings at the First Baptist Church and published in a local black newspaper. Petitioners admittedly sought to persuade others to join the boycott through social pressure and the "threat" of social ostracism. Speech does not lose its protected character, however, simply because it may embarrass others or coerce them into action. As Justice Rutledge, in describing the protection afforded by the First Amendment, explained:

> "It extends to more than abstract discussion, unrelated to action. The First Amendment is a charter for government, not for an institution of learning. 'Free trade in ideas' means free trade in the opportunity to persuade to action, not merely to decribe facts." *Thomas* v. *Collins*, 323 U. S. 516, 537.

In *Organization for a Better Austin* v. *Keefe*, 402 U. S. 415, the Court considered the validity of a prior restraint on speech that invaded the "privacy" of the respondent. Petitioner, a racially integrated community organization, charged that respondent, a real estate broker, had engaged in tactics known as "blockbusting" or "panic peddling."[44] Petitioner asked respondent to sign an agreement that he would not solicit property in their community. When he refused, petitioner distributed leaflets near respondent's home that were critical of his business practices.[45] A state court enjoined petitioner from distributing the leaflets; an appellate court affirmed on the ground that the alleged activities were coercive and intimidating, rather than informative, and therefore not entitled to First Amendment protection. *Id.*, at 418. This Court reversed. THE CHIEF JUSTICE explained:

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[44] Specifically, petitioner contended that respondent "aroused the fears of the local white residents that Negroes were coming into the area and then, exploiting the reactions and emotions so aroused, was able to secure listings and sell homes to Negroes." 402 U. S., at 416.

> "This Court has often recognized that the activity of peaceful pamphleteering is a form of communication protected by the First Amendment. *E. g.*, *Martin* v. *City of Struthers*, 319 U. S. 141 (1943); *Schneider* v. *State*, 308 U. S. 147 (1939); *Lovell* v. *Griffin*, 303 U. S. 444 (1938). In sustaining the injunction, however, the Appellate Court was apparently of the view that petitioners' purpose in distributing their literature was not to inform the public, but to 'force' respondent to sign a no-solicitation agreement. The claim that the expressions were intended to exercise a coercive impact on respondent does not remove them from the reach of the First Amendment. Petitioners plainly intended to influence respondent's conduct by their activities; this is not fundamentally different from the function of a newspaper. See *Schneider* v. *State, supra*; *Thornhill* v. *Alabama*, 310 U. S. 88 (1940). Petitioners were engaged openly and vigorously in making the public aware of respondent's real estate practices. Those practices were offensive to them, as the views and practices of petitioners are no doubt offensive to others. But so long as the means are peaceful, the communication need not meet standards of acceptability." *Id.*, at 419.

In dissolving the prior restraint, the Court recognized that "offensive" and "coercive" speech was nevertheless protected by the First Amendment.[46]

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[45] One of petitioner's officers testified at trial that he had hoped that respondent would be induced to sign the no-solicitation agreement by letting "his neighbors know what he was doing to us." *Id.*, at 417.

In sum, the boycott clearly involved constitutionally protected activity. The established elements of speech, assembly, association and petition, "though not identical, are inseparable." *Thomas* v. *Collins*, 323 U. S. 516, 530. Through exercise of these First Amendment rights, petitioners sought to bring about political, social, and economic change. Through speech, assembly, and petition—rather than through riot or revolution—petitioners sought to change a social order that had consistently treated them as second-class citizens.

The presence of protected activity, however, does not end the relevant constitutional inquiry. Governmental regulation that has an incidental effect on First Amendment freedoms may be justified in certain narrowly defined instances. See *United States* v. *O'Brien*, 391 U. S. 367.[47] A nonviolent and totally voluntary boycott may have a disruptive effect on local economic conditions. This Court has recognized the strong governmental interest in certain forms of economic regulation, even though such regulation may have an incidental effect on rights of speech and association. See

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[46] See *Watts* v. *United States*, 394 U. S. 705, 708 ("The language of the political arena, like the language used in labor disputes, see *Linn* v. *United Plant Guard Workers of America*, 383 U. S. 53, 58 (1966), is often vituperative, abusive, and inexact.") See also *Cohen* v. *California*, 403 U. S. 15; Farber, Commercial Speech and First Amendment Theory, 74 Nw. U. L. Rev. 372 (1979).

[47] "To characterize the quality of the governmental interest which must appear, the Court has employed a variety of descriptive terms: compelling; substantial; subordinating; paramount; cogent; strong. Whatever imprecision inheres in these terms, we think it clear that a government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest." 391 U. S., at 376–377 (footnotes omitted).

Giboney v. *Empire Storage*, 336 U. S. 490; *NLRB* v. *Retail Store Employees Union*, 447 U. S. 607. The right of business entities to "associate" to suppress competition may be curtailed. *National Soc. of Professional Engineers* v. *United States*, 435 U. S. 679. Unfair trade practices may be restricted. Secondary boycotts and picketing by labor unions may be prohibited, as part of "Congress' striking of the delicate balance between union freedom of expression and the ability of neutral employers, employees, and consumers to remain free from coerced participation in industrial strife." *NLRB* v. *Retail Store Employees Union*, *supra*, at 617–618 (BLACKMUN, J., concurring). See *International Longshoremen's Assoc.* v. *Allied International*, —— U. S. ——, ——.

While States have broad power to regulate economic activity, we do not find a comparable right to prohibit peaceful political activity such as that found in the boycott in this case. This Court has recognized that expression on public issues "has always rested on the highest rung of the hierarchy of First Amendment values." *Carey* v. *Brown*, 447 U. S. 455, 467. "[S]peech concerning public affairs is more than self-expression; it is the essence of self-government." *Garrison* v. *Louisiana*, 379 U. S. 64, 74–75. There is a "profound national commitment" to the principle that "debate on public issues should be uninhibited, robust, and wide-open." *New York Times* v. *Sullivan*, 376 U. S. 254, 270.

In *Eastern Railroad Presidents Conference* v. *Noerr Motor Freight*, 365 U. S. 127, the Court considered whether the Sherman Act prohibited a publicity campaign waged by railroads against the trucking industry that was designed to foster the adoption of laws destructive of the trucking business, to create an atmosphere of distaste for truckers among the general public, and to impair the relationships existing between truckers and their customers. Noting that the "right of petition is one of the freedoms protected by the Bill of Rights, and we cannot, of course, lightly impute to Congress an intent to invade these freedoms," the Court held that the

Sherman Act did not proscribe the publicity campaign. *Id.*, at 137–138. The Court stated that it could not see how an intent to influence legislation to destroy the truckers as competitors "could transform conduct otherwise lawful into a violation of the Sherman Act." *Id.*, at 138–139. Noting that the right of the people to petition their representatives in government "cannot properly be made to depend on their intent in doing so," the Court held that "at least insofar as the railroads' campaign was directed toward obtaining governmental action, its legality was not at all affected by any anticompetitive purpose it may have had." *Id.*, at 139–140. This conclusion was not changed by the fact that the railroads' anticompetitive *purpose* produced an anticompetitive *effect*; the Court rejected the truckers' Sherman Act claim despite the fact that "the truckers sustained some direct injury as an incidental effect of the railroads' campaign to influence governmental action." *Id.*, at 143.

It is not disputed that a major purpose of the boycott in this case was to influence governmental action. Like the railroads in *Noerr*, the petitioners certainly foresaw—and directly intended—that the merchants would sustain economic injury as a result of their campaign. Unlike the railroads in that case, however, the purpose of petitioners' campaign was not to destroy legitimate competition. Petitioners sought to vindicate rights of equality and of freedom that lie at the heart of the Fourteenth Amendment itself. The right of the States to regulate economic activity could not justify a complete prohibition against a nonviolent, politically-motivated boycott designed to force governmental and economic change and to effectuate rights guaranteed by the Constitution itself.[48]

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[48] In *NAACP* v. *Alabama*, 377 U. S. 288, the Court unanimously rejected Alabama's effort to oust the NAACP from that State. The State claimed, in part, that the NAACP was "'engaged in organizing, supporting and financing an illegal boycott'" of Montgomery's bus system. *Id.*, at

In upholding an injunction against the state supersedeas bonding requirement in this case, Judge Ainsworth of the Court of Appeals for the Fifth Circuit cogently stated:

> "At the heart of the Chancery Court's opinion lies the belief that the mere organization of the boycott and every activity undertaken in support thereof could be subject to judicial prohibition under state law. This view accords insufficient weight to the First Amendment's protection of political speech and association. There is no suggestion that the NAACP, MAP or the individual defendants were in competition with the white businesses or that the boycott arose from parochial economic interests. On the contrary, the boycott grew out of a racial dispute with the white merchants and city government of Port Gibson and all of the picketing, speeches, and other communication associated with the boycott were directed to the elimination of racial discrimination in the town. This differentiates this case from a boycott organized for economic ends, for speech to protest racial discrimination is essential political speech lying at the core of the First Amendment." *Henry* v. *First National Bank of Clarksdale*, 595 F. 2d 291, 303 (1979)(footnote omitted).

We hold that the nonviolent elements of petitioners' activities are entitled to the protection of the First Amendment.[*]

B

The Mississippi Supreme Court did not sustain the chancel-

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302. Writing for the Court, Justice Harlan described as "doubtful" the "assumption that an organized refusal to ride on Montgomery's buses in protest against a policy of racial segregation might, without more, in some circumstances violate a valid state law." *Id.*, at 307. In *Missouri* v. *NOW*, 620 F. 2d 1301, 1317 (CA8 1980), *cert. denied*, 449 U. S. 842, Judge Stephenson stated that "the right to petition is of such importance that it is not an improper interference [under state tort law] even when exercised by way of a boycott."

[*] We need not decide in this case the extent to which a narrowly tailored statute designed to prohibit certain forms of anticompetitive conduct or

lor's imposition of liability on a theory that state law prohibited a nonviolent, politically-motivated boycott. The fact that such activity is constitutionally protected, however, imposes a special obligation on this Court to examine critically the basis on which liability was imposed.[50] In particular, we consider here the effect of our holding that much of petitioners' conduct was constitutionally protected on the ability of the State to impose liability for elements of the boycott that were not so protected.[51]

The First Amendment does not protect violence. "Certainly violence has no sanctuary in the First Amendment, and the use of weapons, gunpowder, and gasoline may not constitutionally masquerade under the guise of 'advocacy.'" *Samuels* v. *Mackell*, 401 U. S. 66, 75 (Douglas, J., concur-

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certain types of secondary pressure may restrict protected First Amendment activity. No such statute is involved in this case. Nor are we presented with a boycott designed to secure aims that are themselves prohibited by a valid state law. See *Hughes* v. *Superior Court*, 339 U. S. 460.

[50] "This Court's duty is not limited to the elaboration of constitutional principles; we must also in proper cases review the evidence to make certain that those principles have been constitutionally applied. This is such a case, particularly since the question is one of alleged trespass across 'the line between speech unconditionally guaranteed and speech which may legitimately be regulated.' *Speiser* v. *Randall*, 357 U. S. 513, 525. In cases where that line must be drawn, the rule is that we 'examine for ourselves the statements in issue and the circumstances under which they were made to see . . . whether they are of a character which the principles of the First Amendment, as adopted by the Due Process Clause of the Fourteenth Amendment, protect.' *Pennekamp* v. *Florida*, 328 U. S. 331, 335; see also *One, Inc.*, v. *Olesen*, 355 U. S. 371; *Sunshine Book Co.* v. *Summerfield*, 355 U. S. 372. We must 'make an independent examination of the whole record,' *Edwards* v. *South Carolina*, 372 U. S. 229, 235, so as to assure ourselves that the judgment does not constitute a forbidden intrusion on the field of free expression." *New York Times Co.* v. *Sullivan*, 376 U. S. 254, 285.

[51] Although this is a civil lawsuit between private parties, the application of state rules of law by the Mississippi state courts in a manner alleged to restrict First Amendment freedoms constitutes "state action" under the Fourteenth Amendment. *New York Times* v. *Sullivan*, *supra*, at 265.

ring). Although the extent and significance of the violence in this case is vigorously disputed by the parties, there is no question that acts of violence occurred. No federal rule of law restricts a State from imposing tort liability for business losses that are caused by violence and by threats of violence. When such conduct occurs in the context of constitutionally protected activity, however, "precision of regulation" is demanded. *NAACP* v. *Button*, 371 U. S. 415, 438.[52] Specifically, the presence of activity protected by the First Amendment imposes restraints on the grounds that may give rise to damage liability and on the persons who may be held accountable for those damages.

In *United Mine Workers* v. *Gibbs*, 383 U. S. 715, the Court considered a case in many respects similar to the one before us. The case grew out of the rivalry between the United Mine Workers (UMW) and the Southern Labor Union (SLU) over representation of workers in the southern Appalachian coal fields. A coal company laid off 100 miners of UMW's Local 5881 when it closed one of its mines. That same year, a subsidiary of the coal company hired Gibbs as mine superintendent to attempt to open a new mine on nearby property through use of members of the SLU. Gibbs also received a contract to haul the mine's coal to the nearest railroad loading point. When he attempted to open the mine, however, he was met by armed members of Local 5881 who threatened Gibbs and beat an SLU organizer. These incidents occurred on August 15 and 16. Thereafter, there was no further violence at the mine site and UMW members maintained a peaceful picket line for nine months. No attempts to open the mine were made during that period.

Gibbs lost his job as superintendent and never began performance of the haulage contract. Claiming to have suffered losses as a result of the union's concerted plan against him,

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[52] See also *Carroll* v. *Princess Anne*, 393 U. S. 175, 184; *Keyishian* v. *Board of Regents*, 385 U. S. 589, 604.

Gibbs filed suit in federal court against the international UMW. He alleged an unlawful secondary boycott under the federal labor laws and, as a pendent state law claim, "an unlawful conspiracy and an unlawful boycott aimed at him . . . to maliciously, wantonly and willfully interfere with his contract of employment and with his contract of haulage." *Id.*, at 720. The federal claim was dismissed on the ground that the dispute was "primary" and therefore not cognizable under the federal prohibition of secondary labor boycotts. Damages were awarded against the UMW, however, on the state claim of interference with an employment relationship.

This Court reversed. The Court found that the pleadings, arguments of counsel, and jury instructions had not adequately defined the compass within which damages could be awarded under state law. The Court noted that it had "consistently recognized the right of States to deal with violence and threats of violence appearing in labor disputes" and had sustained "a variety of measures against the contention that state law was pre-empted by the passage of federal labor legislation." *Id.*, at 729. To accommodate federal labor policy, however, the Court in *Gibbs* held: "the permissible scope of state remedies in this area is strictly confined to the direct consequences of such [violent] conduct, and does not include consequences resulting from associated peaceful picketing or other union activity." *Ibid.* The Court noted that in *United Construction Workers* v. *Laburnum Construction Corp.*, 347 U. S. 656, damages were restricted to those directly and proximately caused by wrongful conduct chargeable to the defendants. "'Thus there [was] nothing in the measure of damages to indicate that state power was exerted to compensate for anything more than the direct consequences of the violent conduct.'" *Id.*, at 730 (quoting *San Diego Building Trades Council* v. *Garmon*, 359 U. S. 236, 248, n. 6).

The careful limitation on damage liability imposed in *Gibbs* resulted from the need to accommodate state law with federal labor policy. That limitation is no less applicable, however, to the important First Amendment interests at issue in this case. Petitioners withheld their patronage from the white establishment of Claiborne County to challenge a political and economic system that had denied them the basic rights of dignity and equality that this country had fought a civil war to secure. While the State legitimately may impose damages for the consequences of violent conduct, it may not award compensation for the consequences of nonviolent, protected activity. Only those losses proximately caused by unlawful conduct may be recovered.

The First Amendment similarly restricts the ability of the State to impose liability on an individual solely because of his association with another. In *Scales* v. *United States*, 367 U. S. 203, 229, the Court noted that a "blanket prohibition of association with a group having both legal and illegal aims" would present "a real danger that legitimate political expression or association would be impaired." The Court suggested that to punish association with such a group, there must be "clear proof that a defendant 'specifically intend[s] to accomplish [the aims of the organization] by resort to violence.'" *Ibid.* (quoting *Noto* v. *United States*, 367 U. S. 290, 299).[53] Moreover, in *Noto* v. *United States* the Court emphasized that this intent must be judged "according to the strictest law,"[54] for "otherwise there is a danger that one in sympathy with the legitimate aims of such an organization, but not specifically intending to accomplish them by resort to violence, might be punished for his adherence to lawful and constitionally protected purposes, because of other and unprotected purposes which he does not necessarily share." 367 U. S., at 299–300.

In *Healy* v. *James*, 408 U. S. 169, the Court applied these principles in a non-criminal context. In that case the Court held that a student group could not be denied recognition at a state-supported college merely because of its affiliation with a national organization associated with disruptive and violent campus activity. It noted that "the Court has consistently disapproved governmental action imposing criminal sanctions or denying rights and privileges solely because of a citizen's association with an unpopular organization." *Id.*, at 185–186. The Court stated that "it has been established that 'guilt by association alone, without [establishing] that an individual's association poses the threat feared by the Government,' is an impermissible basis upon which to deny First Amendment rights." *Id.*, at 186 (quoting *United States* v. *Robel*, 389 U. S. 258, 265). "The government has the burden of establishing a knowing affiliation with an organization possessing unlawful aims and goals, and a specific intent to further those illegal aims." *Ibid.*[55]

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[53] See *United States* v. *Robel*, 389 U. S. 258; *Elfbrandt* v. *Russell*, 384 U. S. 11; *Aptheker* v. *Secretary of State*, 378 U. S. 500.

[54] "*Strictissimi juris.*" 367 U. S., at 299.

The principles announced in *Scales*, *Noto*, and *Healy* are relevant to this case. Civil liability may not be imposed merely because an individual belonged to a group, some members of which committed acts of violence. For liability to be imposed by reason of association alone, it is necessary to establish that the group itself possessed unlawful goals and that the individual held a specific intent to further those illegal aims.[56] "In this sensitive field, the State may not employ 'means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved.' *Shelton* v.

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[55] In *Rizzo* v. *Goode*, 423 U. S. 362, the Court vacated an injunction, directed against an entire police department, that had resulted from 20 specific incidents of police misconduct. The Court held that such collective responsibility should be limited to instances in which a concerted design existed to accomplish a wrongful objective. *Id.*, at 373–376.

[56] Of course, the question whether an individual may be held liable for damages merely by reason of his association with others who committed unlawful acts is quite different from the question whether an individual may be held liable for unlawful conduct that he himself authorized or incited. See p. 40, *infra*.

Tucker, 364 U. S. 479, 488 (1960)." *Carroll* v. *Princess Anne*, 393 U. S. 175, 184.

III

The chancellor awarded respondents damages for all business losses that were sustained during a seven year period beginning in 1966 and ending December 31, 1972.[57] With the exception of Aaron Henry, all defendants were held jointly and severally liable for these losses. The chancellor's findings were consistent with his view that voluntary participation in the boycott was a sufficient basis on which to impose liability. The Mississippi Supreme Court properly rejected that theory; it nevertheless held that petitioners were liable for all damages "resulting from the boycott."[58] In light of the principles set forth above, it is evident that such a damage award may not be sustained in this case.

The opinion of the Mississippi Supreme Court itself demonstrates that all business losses were not proximately caused by the violence and threats of violence found to be present. The court stated that "coercion, intimidation, and threats" formed "*part* of the boycott activity" and "*contributed* to its almost complete success."[59] The court broadly asserted—without differentiation—that "intimidation, threats, social ostracism, vilification, and traduction" were devices used by the defendants to effectuate the boycott.[60] The court repeated the chancellor's finding that "the volition of *many* black persons was overcome out of sheer fear."[61] These findings are inconsistent with the court's imposition of all damages "resulting from the boycott." To the extent that the court's judgment rests on the ground that "many" black citizens were "intimidated" by "threats" of "social ostracism, vilification, and traduction," it is flatly inconsistent with the First Amendment. The ambiguous findings of the Mississippi Supreme Court are inadequate to assure the "precision of regulation" demanded by that constitutional provision.

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[57] It is noteworthy that the portion of the chancellor's opinion discussing damages begins by referring expressly to the two theories of liability that the Mississippi Supreme Court rejected:

"The complainants proved, in this record, that they suffered injury to their respective businesses as the direct and proximate result of the unlawful secondary boycott and the defendants' actions in restraining trade, all of which was accomplished by defendants through a conspiracy." App. to Pet. for Cert. 57b.

In a footnote, the chancellor added that "any kind of boycott is unlawful if executed with force or violence or threats." *Id.*, at 57b, n. 21.

[58] *Id.*, at 35a.

[59] *Id.*, at 24a (emphasis added).

The record in this case demonstrates that all of respondents' losses were not proximately caused by violence or threats of violence. As respondents themselves stated at page 12 of their brief in the Mississippi Supreme Court:

> "Most of the witnesses testified that they voluntarily went along with the NAACP and their fellow black citizens in honoring and observing the boycott because they wanted the boycott."

This assessment is amply supported by the record.[62] It is indeed inconceivable that a boycott launched by the unanimous vote of several hundred persons succeeded solely through fear and intimidation. Moreover, the fact that the boycott "intensified" following the shootings of Martin Luther King, Jr. and Roosevelt Jackson demonstrates that factors other than force and violence (by the petitioners) figured prominently in the boycott's success. The chancellor made no finding that any act of violence occurred after 1966. While the timing of the acts of violence was not important to the chancellor's imposition of liability, it is a critical factor under the narrower rationale of the Mississippi Supreme Court. That court has completely failed to demonstrate that business losses suffered in 1972—three years after this lawsuit was filed—were proximately caused by the isolated acts of violence found in 1966.[63] It is impossible to conclude that state power has not been exerted to compensate respondents for the direct consequences of nonviolent, constitutionally protected activity.

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[60] *Id.*, at 20a (quoting *id.*, at 39b).

[61] *Ibid.* (emphasis added).

[62] The testimony of Julia Johnson—although itself only a small portion of a massive record—perhaps best illustrates this point:

Q. "How did you observe the boycott?

A. "I just stayed out of the stores, because I had my own personal reasons to stay out of the stores. There were some things I really wanted, and the things I wanted were the right to vote, the right to have a title—Mrs. or Mr. or whatever I am, and not uncle or aunt, boy or girl. So that's what I wanted. And if I wanted a job—a qualified job, I wanted to have the opportunity to be hired. Not because I'm black or white, but just hired.

Q. "And this was your reason for observing the boycott?

A. "Yes, it was.

Q. "And you were in favor of the boycott?

A. "Yes, I was in favor of the boycott.

This case is not like *Milk Wagon Drivers Union* v. *Meadowmoor Dairies*, 312 U. S. 287, in which the Court held that the presence of violence justified an injunction against both violent and nonviolent activity.[64] The violent conduct

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Q. "And it wasn't because somebody threatened you?
A. "No, it wasn't because nobody threatened me.
Q. "You weren't afraid?
A. "Was I afraid?
Q. "Yes.
A. "No, I was not afraid." R. 15476.

It is clear that losses were sustained because persons like Julia Johnson "wanted justice and equal opportunity." R. 6864 (testimony of Margaret Liggins). See R. 6737, 12419, 13543–13544.

[63] It is also noteworthy that virtually every victim of the acts of violence found by the chancellor testified that he or she continued to patronize the white merchants. See *supra*, at 17–18.

[64] In *Mine Workers* v. *Gibbs*, *supra*, the Court stated that if "special facts" such as those presented in *Meadowmoor* "appeared in an action for damages after picketing marred by violence had occurred," they might

present in that case was pervasive.[66] The Court in *Meadowmoor* stated that "utterance in a context of violence can lose its significance as an appeal to reason and become part of an instrument of force." *Id.*, at 293. The Court emphasized, however:

> "Still it is of prime importance that no constitutional freedom, least of all the guarantees of the Bill of Rights, be defeated by insubstantial findings of fact screening reality. That is why this Court has the ultimate power to search the records in the state courts where a claim of constitutionality is effectively made. And so the right of free speech cannot be denied by drawing from a trivial rough incident or a moment of animal exuberance the conclusion that otherwise peaceful picketing has the taint of force." *Ibid.*

Such "insubstantial findings" were not present in *Meadowmoor*. But in this case, the Mississippi Supreme Court has relied on isolated acts of violence during a limited period to uphold respondents' recovery of *all* business losses sustained over a seven-year span. No losses are attributed to the voluntary participation of individuals determined to se-

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"support the conclusion that all damages resulting from the picketing were proximately caused by its violent component or by the fear which that violence engendered." 383 U. S., at 731–732.

[66] As described by the Court: "Witnesses testified to more than fifty instances of windowsmashing; explosive bombs caused substantial injury to the plants of Meadowmoor and another dairy using the vendor system and to five stores; stench bombs were dropped in five stores; three trucks of vendors were wrecked, seriously injuring one driver, and another was driven into a river; a store was set on fire and in large measure ruined; two trucks of vendors were burned; a storekeeper and a truck driver were severely beaten; workers at a diary which, like Meadowmoor, used the vendor system were held with guns and severely beaten about the head while being told 'to join the union'; carloads of men followed vendors' trucks, threatening the drivers, and in one instance shot at the truck and driver." 312 U. S., at 291–292.

cure "justice and equal opportunity."[66] The court's judgment "screens reality" and cannot stand.[67]

Respondents' supplemental brief also demonstrates that on the present record no judgment may be sustained against most of the petitioners. Regular attendance and participation at the Tuesday meetings of the Claiborne County Branch of the NAACP is an insufficient predicate on which to impose liability. The chancellor's findings do not suggest that any illegal conduct was authorized, ratified, or even discussed at any of the meetings. The sheriff testified that he was kept informed of what transpired at the meetings; he made no reference to any discussion of unlawful activity.[68] To impose liability for presence at weekly meetings of the NAACP would—ironically—not even constitute "guilt by association," since there is no evidence that the association possessed unlawful aims. Rather, liability could only be imposed on a "guilt *for* association" theory. Neither is permissible under the First Amendment.[69]

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[66] See n. 62, *supra*.

[67] For the same reasons, the permanent injunction entered by the chancellor must be dissolved. Since the boycott apparently has ended, the Mississippi Supreme Court may wish to vacate the entire injunction on the ground that it is no longer necessary; alternatively, the injunction must be modified to restrain only unlawful conduct and the persons responsible for conduct of that character.

[68] See R. 1172. The strongest evidence of wrongdoing at the meetings was presented by petitioner Marjorie Brandon, who served at times as the local NAACP secretary. She testified that "in the meetings there were statements saying you would be dealt with" if found trading in boycotted stores. R. 5637. She stated that she understood "dealt with" to mean "they would take care of you, do something to you, if you were caught going in." *Ibid.* Her testimony does not disclose who made the statements, how often they were made, or that they were in any way endorsed by others at the meetings. A massive damage judgment may not be sustained on the basis of this testimony; the fact that certain anonymous persons made such statements at some point during a seven-year period is insufficient to establish that the association itself possessed unlawful aims or that any petitioner specifically intended to further an unlawful goal.

[69] A legal duty to "repudiate"—to disassociate oneself from the acts of

Respondents also argue that liability may be imposed on individuals who were either "store watchers" or members of the "Black Hats." There is nothing unlawful in standing outside of a store and recording names. Similarly, there is nothing unlawful in wearing black hats, although such apparel may cause apprehension in others. As established above, mere association with either group—absent a specific intent to further an unlawful aim embraced by that group—is an insufficient predicate for liability. At the same time, the evidence does support the conclusion that some members of each of these groups engaged in violence or threats of violence. Unquestionably, these individuals may be held responsible for the injuries that they caused; a judgment tailored to the consequences of their unlawful conduct may be sustained.

Respondents have sought separately to justify the judgment entered against Charles Evers and the national NAACP. As set forth by the chancellor, Evers was specially connected with the boycott in four respects. First, Evers signed the March 23 supplemental demand letter and unquestionably played the primary leadership role in the organization of the boycott. Second, Evers participated in negotiations with MAP and successfully convinced MAP to abandon its practice of purchasing food alternately from white-owned and black-owned stores. Third, he apparently presided at the April 1, 1966 meeting at which the vote to be-

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another—cannot arise unless, absent the repudiation, an individual could be found liable for those acts. As our decisions in *Scales*, *Noto*, and *Healy* make clear, see *supra*, at 33, civil liability may not be imposed merely because an individual belonged to a group, some members of which committed acts of violence. The chancellor in this case made no finding that the individuals who committed those acts of violence were "agents" or "servants" of those who attended the NAACP meetings; certainly such a relationship cannot be found simply because both shared certain goals. Cf. *General Building Constructors Assn.* v. *Pennsylvania*, —— U. S. ——, ——.

gin the boycott was taken; he delivered a speech to the large audience that was gathered on that occasion. See n. 28, *supra.* Fourth, Evers delivered the speeches on April 19 and 21, 1969, which we have discussed previously. See *supra*, at 15; appendix.

For the reasons set forth above, liability may not be imposed on Evers for his presence at NAACP meetings or his active participation in the boycott itself. To the extent that Evers caused respondents to suffer business losses through his organization of the boycott, his emotional and persuasive appeals for unity in the joint effort, or his "threats" of vilification or social ostracism, Evers' conduct is constitutionally protected and beyond the reach of a damage award. Respondents point to Evers' speeches, however, as justification for the chancellor's damage award. Since respondents would impose liability on the basis of a public address—which predominantly contained highly charged political rhetoric lying at the core of the First Amendment—we approach this suggested basis of liability with extreme care.

There are three separate theories that might justify holding Evers liable for the unlawful conduct of others. First, a finding that he authorized, directed or ratified specific tortious activity would justify holding him responsible for the consequences of that activity. Second, a finding that his public speeches were likely to incite lawless action could justify holding him liable for unlawful conduct that in fact followed within a reasonable period. Third, the speeches might be taken as evidence that Evers gave other specific instructions to carry out violent acts or threats.

While many of the comments in Evers' speeches might have contemplated "discipline" in the permissible form of social ostracism, it cannot be denied that references to the possibility that necks would be broken and to the fact that the chief of police could not sleep with boycott violators at night implicitly conveyed a sterner message. In the passionate atmosphere in which the speeches were delivered, they might have been understood as inviting an unlawful form of discipline or, at least, as intending to create a fear of violence whether or not improper discipline was specifically intended.

It is clear that "fighting words"—those that provoke immediate violence—are not protected by the First Amendment. *Chaplinsky* v. *New Hamshire*, 315 U. S. 568, 572. Similarly, words that create an immediate panic are not entitled to constitutional protection. *Schenck* v. *United States*, 249 U. S. 47.[29] This Court has made clear, however, that mere *advocacy* of the use of force or violence does not remove speech from the protection of the First Amendment. In *Brandenburg* v. *Ohio*, 395 U. S. 444, we reversed the conviction of a Ku Klux Klan leader for threatening "revengeance" if the "suppression" of the white race continued; we relied on "the principle that the constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action." *Id.*, at 447. See *Noto* v. *United States*, 367 U. S. 299, 297–298 ("the mere abstract teaching . . . of the moral propriety or even moral necessity for a resort to force and violence, is not the same as preparing a group for violent action and steeling it to such action.") See also *Whitney* v. *California*, 274 U. S. 357, 372 (Brandeis, J., concurring).

The emotionally charged rhetoric of Charles Evers' speeches did not transcend the bounds of protected speech set forth in *Brandenburg*. The lengthy addresses generally contained an impassioned plea for black citizens to unify, to support and respect each other, and to realize the political and economic power available to them. In the course of those pleas, strong language was used. If that language had been followed by acts of violence, a substantial question would be presented whether Evers could be held liable for the consequences of that unlawful conduct. In this case, however—with the possible exception of the Cox incident—the acts of violence identified in 1966 occurred weeks or months after the April 1, 1966 speech; the chancellor made no finding of any violence after the challenged 1969 speech. Strong and effective extemporaneous rhetoric cannot be nicely channeled in purely dulcet phrases. An advocate must be free to stimulate his audience with spontaneous and emotional appeals for unity and action in a common cause. When such appeals do not incite lawless action, they must be regarded as protected speech. To rule otherwise would ignore the "profound national commitment" that "debate on public issues should be uninhibited, robust, and wide-open." *New York Times* v. *Sullivan*, *supra*, 376 U. S., at 270.[71]

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[29] "The most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic." 249 U. S., at 52.

For these reasons, we conclude that Evers' addresses did not exceed the bounds of protected speech. If there were other evidence of his authorization of wrongful conduct, the references to discipline in the speeches could be used to corroborate that evidence. But any such theory fails for the simple reason that there is no evidence—apart from the speeches themselves—that Evers authorized, ratified, or directly threatened acts of violence.[72] The chancellor's findings are not sufficient to establish that Evers had a duty to "repudiate" the acts of violence that occurred.[73] The findings are constitutionally inadequate to support the damage judgment against him.

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[71] In *Watts* v. *United States*, 394 U. S. 705, the petitioner was convicted of willfully making a threat to take the life of the President. During a public rally at the Washington Monument, petitioner stated in a small discussion group:

"They always holler at us to get an education. And now I have already received my draft classification as 1-A and I have got to report for my physical this Monday morning. I am not going. If they ever make me carry a rifle the first man I want to get in my sights is L.B.J." *Id.*, at 706.

This Court summarily reversed. The Court agreed with the petitioner that the statement, taken in context, was "a kind of very crude offensive method of stating a political opposition to the President." *Id.*, at 708.

[72] There is evidence that Evers occasionally served as a "store watcher," but there is no suggestion that anything improper occurred on those

The liability of the NAACP derived solely from the liability of Charles Evers.[74] The chancellor found:

> "The national NAACP was well-advised of Evers' actions, and it had the option of repudiating his acts or ratifying them. It never repudiated those acts, and therefore, it is deemed by this Court to have affirmed them." App. to Pet. for Cert. 42b–43b.

Of course, to the extent that Charles Evers' acts are insufficient to impose liability upon him, they may not be used to impose liability on his principal. On the present record, however, the judgment against the NAACP could not stand in any event.

The associational rights of the NAACP and its members have been recognized repeatedly by this Court.[75] The NAACP—like any other organization—of course may be held responsible for the acts of its agents throughout the country that are undertaken within the scope of their actual or apparent authority.[76] Cf. *American Society of Mechanical Engi-*

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occasions.

[73] See n. 69, *supra.*

[74] Indeed it is noteworthy that Aaron Henry—who was president of the Mississippi State Conference of the NAACP, president of the Coahoma County Branch of the NAACP, and a member of the Board of Directors of the national NAACP—was the only defendant dismissed by the chancellor on the merits.

[75] Cf. *NAACP* v. *Alabama ex rel. Patterson,* 357 U. S. 449; *Bates* v. *City of Little Rock,* 361 U. S. 516; *Louisiana ex rel. Gremillion* v. *NAACP,* 366 U. S. 293; *NAACP* v. *Button,* 371 U. S. 415; *Gibson* v. *Florida Legislative Comm.,* 372 U. S. 539; *NAACP* v. *Alabama ex rel. Flowers,* 377 U. S. 288.

[76] There is no question that Charles Evers—as its only paid representative in Mississippi—was an agent of the NAACP.

neers, Inc. v. *Hydrolevel,* —— U. S. ——. Moreover, the NAACP may be found liable for other conduct of which it had knowledge and specifically ratified.

The chancellor made no finding that Charles Evers or any other NAACP member had either actual or apparent authority to commit acts of violence or to threaten violent conduct. The evidence in the record suggests the contrary. Aaron Henry, president of the Mississippi State Branch of the NAACP and a member of the Board of Directors of the national organization, testified that the statements attributed to Evers were directly contrary to NAACP policy. R. 4930.[77] Similarly, there is no evidence that the NAACP ratified—or even had specific knowledge of—any of the acts of violence or threats of discipline associated with the boycott. Henry testified that the NAACP never authorized, and never considered taking, any official action with respect to the boycott. R. 4896. The NAACP supplied no financial aid to the boycott. R. 4940. The chancellor made no finding that the national organization was involved in any way in the boycott.[70]

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[77] In a footnote to his discussion of the NAACP's liability, the chancellor wrote:

"Aaron E. Henry, a prominant black leader in the State of Mississippi, who was president of the Mississippi State Conference of the NAACP, president of the Coahoma County Branch of the NAACP, and a member of the Board of Directors of the national NAACP, testified that the NAACP 'absolutely did not approve of the way the boycott was being conducted in Port Gibson.' There is also evidence in the record tending to show that Evers was called to account by the national NAACP because of the manner in which the boycott was conducted. However, the NAACP took no action whatever to curb Evers' activities in this connection." App. to Pet. for Cert. 42b n. 9.

Henry's testimony concerning Evers' having been "called to account by the National NAACP" concerned Evers' failure to make proper reports and Henry's understanding that there was a personality clash between Evers and an executive of the NAACP. R. 4905, 4907. We have found no evidence in the record that any representative of the national NAACP was advised of any facts concerning the manner in which the Port Gibson boycott was conducted.

To impose liability without a finding that the NAACP authorized—either actually or apparently—or ratified unlawful conduct would impermissibly burden the rights of political association that are protected by the First Amendment. As Justice Douglas noted in *NAACP* v. *Overstreet*, 384 U. S. 118, dissenting from a dismissal of a writ of certiorari found to have been improvidently granted:

> "To equate the liability of the national organization with that of the Branch in the absence of any proof that the national authorized or ratified the misconduct in question could ultimately destroy it. The rights of political association are fragile enough without adding the additional threat of destruction by lawsuit. We have not been slow to recognize that the protection of the First Amendment bars subtle as well as obvious devices by which political association might be stifled. See *Bates* v. *Little Rock*, 361 U. S. 516, 523. Thus we have held that forced disclosure of one's political associations is, at least in the absence of a compelling state interest, inconsistent with the First Amendment's guaranty of associational privacy. *E. g., DeGregory* v. *New Hampshire*, 338 U. S. 825; *Gibson* v. *Florida Legislative Comm.*, 372 U. S. 539, 543–546; *Shelton* v. *Tucker*, 364 U. S. 479; *N.A.A.C.P.* v. *Alabama*, 357 U. S. 449, 462–463. Recognizing that guilt by association is a philosophy alien to the traditions of a free society (see *Schware* v. *Board of Bar Examiners*, 353 U. S. 232,

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[70] The chancellor did find that the NAACP had posted bond and provided legal representation for arrested boycott violators. Since the NAACP regularly provides such assistance to indigent black persons throughout the country, this finding cannot support a determination that the national organization was aware of, and ratified, unauthorized violent conduct. Counsel for respondents does not contend otherwise.

> 245–246) and the First Amendment itself, we have held that civil or criminal disabilities may not be imposed on one who joins an organization which has among its purposes the violent overthrow of the Government, unless the individual joins knowing of the organization's illegal purposes (*Wieman* v. *Updegraff*, 344 U. S. 183) and with the specific intention to further those purposes. See *Elfbrandt* v. *Russell*, *ante*, p. 11; *Aptheker* v. *Secretary of State*, 378 U. S. 500." *Id.*, at 122.

The chancellor's findings are not adequate to support the judgment against the NAACP.

IV

In litigation of this kind the stakes are high. Concerted action is a powerful weapon. History teaches that special dangers are associated with conspiratorial activity.[79] And yet one of the foundations of our society is the right of individuals to combine with other persons in pursuit of a common goal by lawful means.[80]

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[79] In discussing the doctrine of criminal conspiracy, Justice Jackson noted:

"The crime comes down to us wrapped in vague but unpleasant connotations. It sounds historical undertones of treachery, secret plotting and violence on a scale that menaces social stability and the security of the state itself. 'Privy conspiracy' ranks with sedition and rebellion in the Litany's prayer for deliverance. Conspiratorial movements do indeed lie back of the political assassination, the *coup d'etat*, the *putsch*, the revolution, and seizures of power in modern times, as they have in all history." *Krulewitch* v. *United States*, 336 U. S. 440, 448 (concurring opinion).

[80] "The most natural privilege of man, next to the right of acting for himself, is that of combining his exertions with those of his fellow creatures and in acting in common with them. The right of association therefore appears to me almost as inalienable in its nature as the right of personal liberty. No legislator can attack it without impairing the foundations of society." de Tocqueville, Democracy in America 203 (Bradley ed. 1954).

At times the difference between lawful and unlawful collective action may be identified easily by reference to its purpose. In this case, however, petitioners' ultimate objectives were unquestionably legitimate. The charge of illegality—like the claim of constitutional protection—derives from the means employed by the participants to achieve those goals. The use of speeches, marches, and threats of social ostracism cannot provide the basis for a damage award. But violent conduct is beyond the pale of constitutional protection.

The taint of violence colored the conduct of some of the petitioners. They, of course, may be held liable for the consequences of their violent deeds. The burden of demonstrating that it colored the entire collective effort, however, is not satisfied by evidence that violence occurred or even that violence contributed to the success of the boycott. A massive and prolonged effort to change the social, political, and economic structure of a local environment cannot be characterized as a violent conspiracy simply by reference to the ephemeral consequences of relatively few violent acts. Such a characterization must be supported by findings that adequately disclose the evidentiary basis for concluding that specific parties agreed to use unlawful means, that carefully identify the impact of such unlawful conduct, and that recognize the importance of avoiding the imposition of punishment for constitutionally protected activity. The burden of demonstrating that fear rather than protected conduct was the dominant force in the movement is heavy. A court must be wary of a claim that the true color of a forest is better revealed by reptiles hidden in the weeds than by the foliage of countless free-standing trees. The findings of the chancellor, framed largely in the light of two legal theories rejected by the Mississippi Supreme Court, are constitutionally insufficient to support the judgment that all petitioners are liable for all losses resulting from the boycott.

The judgment is reversed. The case is remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

JUSTICE REHNQUIST concurs in the result.

JUSTICE MARSHALL took no part in the consideration or decision of this case.

APPENDIX

Portions of speech delivered by Charles Evers on April 19, 1969 (R. 1091–1130):

"Thank you very much. We want our white friends here to know what we tell them happens to be so. Thank you for having the courage to walk down those streets with us. We thank you for letting our white brothers know that Port Gibson ain't none of their town. (Amen) (Applause) That Port Gibson is all of our town. (Applause) That black folks, red folks, Chinese and Japanese alike (Yeah) (That's right.), that we are going to have our share. (Yeah, we are.)

. . . . .

"We are going to beat you because we know you can't trick us no more. (yea) You are not going to be able to fool us by getting somebody to give us a drink of whiskey no more. (Applause) You ain't gonna be able to fool us by somebody giving us a few dollars no more. (Applause) We are gonna take your money and drink with you and then we're gonna (Applause) vote against you. Then we are going to elect a sheriff in this county and a sheriff that is responsible, that won't have to run and grab the telephone and call up the blood-thirsty highway patrol when he gets ready (Yeah) to come in and beat innocent folks down to the ground for no cause. (That's right) (Applause) (Boo) We are going to elect a sheriff that can call his deputies and represent black leaders in the community and stop whatever problem there is. (Yeah) (That's right.)

"Then we are going to do more than that. The white merchants of this town are so wrapped up in the power structure here, since you love your Police Department so well, since you support them so well (Yeah), we are going to let them buy your dirty clothes and your filthy, rotten groceries.

"Oh, no, white folks, we ain't going to shoot you with no bullet. (That's right.) We are going to shoot you with our ballots and with our bucks. (Yea) (That's right.) We are going to take away from you the thing that you have had over us all these years. (Yeah) Political power and economic power. While you kill our brothers and our sisters and rape our wives and our friends. (Yeah) You're guilty. You're guilty because you don't care a thing about anybody. (Yes.) And when you go and let a big, black burly nigger like you get on the police force (Yea) go down and grab another black brother's arm and hold it while a white racist stole him from us, and he's a liar if he says he didn't hold him.

. . . . .

"We mean what we are saying. We are not playing. (Right) We better not even think one of us is black. You better not even be caught near one of these stores. (Applause)

"We don't want you caught in Piggly-Wiggly. You remember how he grinned at us four years ago? (Yeah) You know how when he took office he grinned at us? (Yeah) He ain't hired nobody yet. (That's right) (No) And you know old Jitney Jungle down there with those funny letters down on the end? (That's right) (Applause) He haven't hired nobody in there yet. (No) Do you know poor ole M & M or whatever it stands for, mud and mush, I guess. (Applause) They're out here on the highway and they haven't hired none of us yet.

"Do you know Ellis who had a part-time boy all his life? He ain't hired nobody, is he, yet? (No) Then we got ole Stampley, and ninety-nine and three-fourths of his sales are black folks business. He got the nerve to tell me he ain't gonna put no nigger ringing his cash register. I got news for you, Brother Stampley. You can ring it your damn self. (Extra loud applause.) I want some of you fat cats after this meeting who wants three of our young boys who ain't a'scar'd of white folks (Applause) (Me) and we want you that's willing to follow the rules now to go down by Brother Stampley's and serve notice on him with our placards that we ain't coming no more.

"Then we are going to tell all the young men that drive Piggly-Wiggly trucks now (Yeah) (Be careful, Son.) because the soul brothers and the spirit is watching you. (Extra loud applause.)

"All right, Brother Wolf, you're next. (Applause) We got a couple of 'em to come down by Brother Wolf's. We mean business, white folks. We ain't gonna shoot you all, we are going to hit you where it hurts most. (In the pocketbook) (Applause) In the pocketbook and in the ballot box. (Applause) We may as well tell our friends at Alcorn to stay away from up here. (Yea) Now, you say, 'What's wrong with you niggers?' I'll tell you what is wrong with us niggers; We are tired of you white folks, you racists and you bigots mistreating us. (Yeah) We are tired of paying you to deny us the right to even exist. (Tell 'em about it.) And we ain't coming back, white folks. (We ain't.)

"You all put a curfew on us at eight o'clock tonight. We are going to do you better than that. We are going to leave at one-thirty. (Loud applause) We are going to leave at one-thirty and we ain't coming back, white folks.

. . . . .

"We are going to have Brother McCay; we are going to have our newly elected mayor who we elected, we are going to have him around here, too. Come on back, my dear friend[, he say.] 'Naw, brother, we ain't coming.' 'Have you got rid of all those bigots you got on your police force?' 'No.' 'Have you hired Negroes in all them stores?' 'No.' 'Well, we ain't coming back.' (Right) That's all we gonna do. You know, what they don't realize is that you put on this curfew, that is all we needed. Let me just give them some instructions. We are going to buy gas only from the Negro-owned service stations. We agreed on it, remember? Now, don't back upon your agreement. (Yea) I don't care how many Negroes working on it, that's too bad. We are going only to Negro-owned service stations. And we are going only--the only time you will see us around on this street, now listen good, you are going to Lee's Grocery and other stores on this end. Is that clear? (Yeah) (Applause)

"We don't want to go to none of them drugstores. They get us confused. Now, who am I going to get my medicine from? Let us know in time and we will be glad to furnish a car free to carry you anywhere you have to go to get a prescription filled. You can't beat this. (No) It won't cost you a dime. You go to any of the local black businessmen and tell them you have got to go to Vicksburg to get your stuff. And then if they don't carry you, let us know. We'll take care of them later. (Applause) Now, you know, we have got a little song that says, 'This is your thing, do what you want to do.' (Applause) This is our thing, let's do what we want to do with it. Let's make sure now—if you be disobedient now you are going to be in trouble. Remember that, now, listen. Listen good. They are going to start saying 'You know what, Evers is down there with his goon squad, . . .' Now, we know Claiborne County,—'with his goon squad harassing poor ole niggers.'

"Well, good white folks you have been harassing us all our lives. (Applause) And if we decided to harass you that's our business. (That's right) They are our children and we are going to discipline them the way we want to. Now, be sure you get all this right on all these tape recorders. Whatever I say on this trip I will say it in Jackson. (Amen) (Glory) And I will say it in Washington and New York. White folks ain't gonna never control us no more. (Applause)

. . . . .

"Now, my dear friends, the white folks have got the message. I hope you have got the message and tell every one of our black brothers until all these people are gone, you voted on this in the church, don't let me down, and don't let yourself down. We agreed in the church that we would vacate this town until they have met those requests, the white folks don't demand nothing out of us. All right, white folks, we are just saying until you decide when you want to do these little things we beg of you, we are not coming back. (No way)

"None of us better not be caught up here. (Yea) I don't care how old you are, I don't care how sick you are, I don't care how crazy you are, you better not be caught on these streets shopping in these stores until these demands are met. (Applause)

"Now, let's get together. Are you for this or against it? (Applause) (For it.) Remember you voted this. We intend to enforce it. You needn't go calling the chief of police, he can't help you none. You needn't go calling the sheriff, he can't help you none. (That's right.) He ain't going to offer to sleep with none of us men, I can tell you that. (Applause) Let's don't break our little rules that you agreed upon here.

. . . . .

"Let's go to the funeral of our young son whenever the funeral is. I don't want you to come with hate because that is not going to solve our problems. (No hate.) We don't want you to hate the white folks here in Port Gibson. That is not going to solve it. If you hate what they have done, I hate to get personal, I hate what they did so much to Medgar, (I know.) I ain't going to ever stop hating them for that. But I am going to chase them in the way what I know is right and just. I am not going to lay out in the bushes and shoot no white folks. That's wrong. I am not gonna go out here and bomb none of them's home. (No) That's not right. But I am going to do everything in my power to take away all the power, political power, legal power that they possess anywhere I live. We are going to compete against them. When we blacks learn to support and respect each other, then and not until then, will white folks respect us. (Applause)

"Now, you know I trust white folks and I mean every word I say. But it comes a time when we got to make up in our mind individually, are we going to make those persons worthwhile. We done talked and raised all kind of sand all day here, now, what is really going to prove it, are we going to live up to what we have said? (Applause) Now if there is any one of us breaks what we agreed upon, you are just as guilty as that little trigger-happy, blood-thirsty rascal. (Tell 'em about it.)

. . . . . .

"I go all over this country, and I ought not to tell you white folks this, and I tell other white folks that some day we are going to get together in Mississippi, black and white, and work out our problems. And we are ready to start whenever you are. If you are ready to start, we are. We ain't going to let you push us, not one inch. (That's right.) If you come on beating us, we are going to fight back. (Right) We got our understanding. We are all God's children. The same man that brought you all here brought us. You could have been black just like we are. We could have been white and baldheaded just like you are. (Laughter) (Inaudible) We are going to work hard at this, Dan. We are going to be organized this time. We ain't going to be bought off and talked off. We are going to elect the county sheriff here this next time that don't need the highway patrol. Now, you see, Dan had a good chance to set himself up right, but he goofed it. He goofed. (Yeah) He blew it. (Laughter) Don't forget that, heah. (Right) It brings back memories like you know you remember things we do.

"Now, if you don't think it is necessary, we don't have to go back to the church. If you want to go back there, we can. I want you to make sure here that we are going to leave this town to our white brothers and we ain't coming back no more until all our requests have been met. Is that the common consent of all you here? (Applause) (Let's go back to the church.) All right. Are we willing to make sure that everyone of us will be sure that none of the rest of our black brothers violate our . . . (Yea) We are all saying it now. Let's not say it now so much on my part. You know, I'm just sort of leading, you know, how these lawyers are, leading our folks on to say what has to be said. And that's the case. Let's make us a white town. We would like for you to start it. Be courteous now. Don't mistreat nobody. Tell them, in a nice forceful way, the curfew is going to be on until they do what we ask them."

All issues available have
been filmed.
Unfortunately, any
scattered missing issues
are no longer available.

READEX
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981/81-213

(Slip Opinion)

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Lumber Co.*, 200 U. S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

SCHWEIKER, SECRETARY OF HEALTH AND HUMAN SERVICES v. HOGAN ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

No. 81-213. Argued March 24, 1982—Decided June 21, 1982

Section 1903(f) of the Social Security Act provides that federal reimbursement to States electing to provide Medicaid benefits to the "medically needy" is available only if the income of those persons, after deduction of incurred medical expenses, is less than 133⅓ percent of the state Aid to Families With Dependent Children (AFDC) payment level. Section 1903(f) specifically excepts from this rule the "categorically needy"—those receiving Supplemental Security Income (SSI) because of lack of income to meet their basic needs. As applied in Massachusetts, § 1903(f) results in a distribution of Medicaid benefits to recipients of SSI that is more generous than the distribution of such benefits to persons who are self-supporting. Appellees, each of whom (or his spouse) receives Social Security benefits in an amount that renders him ineligible for either SSI benefits or state supplementary payments, filed suit in Federal District Court, alleging that § 1903(f), as applied in Massachusetts, violates the equal protection component of the Fifth Amendment. Appellees asserted that, since 133⅓ percent of the Massachusetts AFDC payment level is for them lower than the SSI-supplementary payment level, they are ineligible for Medicaid until their income, after deduction of incurred medical expenses, is less than that of SSI-supplementary payment recipients, and that because of the Social Security benefits which they receive, appellees thus have less income available for nonmedical expenses than individuals who—possibly because they never worked and receive no Social Security benefits—are dependent upon public assistance for support. The District Court entered judgment for appellees.

Held:

1. There is no merit to appellees' contention that the Social Security

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Act itself compels the conclusion that, if Medicaid services are provided to the "medically needy," those persons may not be forced to incur medical expenses that would reduce their remaining income below the applicable public assistance standard. The legislative history of the Medicaid provisions of the Act does not justify a departure from the literal and clear language of § 1903(f). Nor does § 1903(f)'s literal language conflict with any other provision of the Act. Moreover, adherence to that section's language is consistent with its interpretation by the Secretary of Health and Human Services. Thus, the discrimination challenged in this case is required by the Social Security Act. Pp. 15-18.

2. As applied in Massachusetts, § 1903(f) does not violate constitutional principles of equal treatment. While powerful equities support appellees' claim of unfair treatment insofar as they receive less medical assistance and have less income remaining for their nonmedical needs than do SSI recipients, a belief that an Act of Congress may be inequitable or unwise is an insufficient basis on which to conclude that it is unconstitutional. The optional character of the congressional scheme—whereby participating States must provide Medicaid benefits to the categorically needy but may elect not to provide any benefits at all to the medically needy—does not itself violate constitutional principles of equality. Since a State may deny all benefits to the medically needy—while providing benefits to the categorically needy and rendering some persons who are on public assistance better off than others who are not—it may narrow the gap between the two classes by providing partial benefits to the medically needy, even though certain members of that class may remain in a position less fortunate than those on public assistance. The fact that Massachusetts has provided Medicaid benefits to the medically needy does not force it to make immediate medical need the sole standard in its entire Medicaid program. Pp. 19-23.

501 F. Supp. 1129, reversed and remanded.

STEVENS, J., delivered the opinion for a unanimous Court.

NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D.C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

SUPREME COURT OF THE UNITED STATES

No. 81-213

RICHARD S. SCHWEIKER, SECRETARY OF HEALTH AND HUMAN SERVICES, APPELLANT *v.* GEORGE HOGAN, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

[June 21, 1982]

JUSTICE STEVENS delivered the opinion of the Court.

At issue in this case are the meaning and validity of § 1903(f) of the Social Security Act, 42 U. S. C. § 1396b(f). As applied in Massachusetts, that provision results in a distribution of Medicaid benefits to recipients of Supplemental Security Income (SSI)—a class of aged, blind, or disabled persons who lack sufficient income to meet their basic needs—that is more generous than the distribution of such benefits to persons who are self-supporting. Appellees are members of the latter class. Because they must incur medical expenses—for which they are never reimbursed—before they become eligible for Medicaid, they have less income available for their non-medical needs than the recipients of SSI. The District Court concluded that this discrimination was irrational and held that § 1903(f) was unconstitutional. *Hogan* v. *Harris*, 501 F. Supp. 1129 (Mass. 1980). We disagree and reverse.

The statutory provisions governing the Medicaid program are complex. See 42 U. S. C. 1396 *et seq.* (1976 ed. and Supp. IV). We first consider the history of the specific provisions at issue in this case, then relate the circumstances that gave rise to the present controversy, and finally address the two legal issues that are presented.

I

Section 1903(f) of the Social Security Act (Act) was enacted in 1967. To understand the present controversy, however, it is necessary to consider amendments to the Act made in 1965, 1967, and 1972.

A

The Medicaid program was established in 1965 in Title XIX of the Act "for the purpose of providing federal financial assistance to States that choose to reimburse certain costs of medical treatment for needy persons." *Harris* v. *McRae*, 448 U. S. 297, 301. Section 1902(a)(10) of the Act, 42 U. S. C. § 1396a(a)(10), sets forth the basic scope of the program, which has not changed significantly from its enactment in 1965. See 79 Stat. 345. Participating States are required to provide Medicaid coverage to certain individuals—now described as the "categorically needy"; at their option States also may provide coverage (and receive partial federal reimbursement) to other individuals—described as the "medically needy." See *Schweiker* v. *Gray Panthers*, 453 U. S. 34, 37.[1] These classes are defined by reference to other federal assistance programs.

In 1965, federal assistance programs existed for the aged, the blind, the disabled, and families with dependent children.[2] At that time, each of these programs was administered by the States, which established both the "standard of need" and the "level of benefits." See *Jefferson* v. *Hackney*, 406 U. S. 535; *Rosado* v. *Wyman*, 397 U. S. 397.[3] In establishing the Medicaid program, Congress required participating States to provide medical assistance to individuals who received cash payments under one of these assistance programs. 79 Stat. 345; see 42 U. S. C. § 1396a(a)(10)(A), as amended. The House Report explained: "These people are the most needy in the country and it is appropriate for medical care costs to be met, first, for these people."[4] They are the "categorically needy."

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[1] But see n. 18, *infra*.

[2] These programs were entitled: Old Age Assistance (OAA), 42 U. S. C. § 301 *et seq.* (1970 ed.); Aid to the Blind, § 1201 *et seq.*; Aid to the Permanently and Totally Disabled, § 1351 *et seq.*; and Aid to Families with Dependent Children (AFDC), § 601 *et seq.* See also 42 U. S. C. § 1381–1385 (1970 ed.). These programs are of course fundamentally different from Old Age, Survivors, and Disability Insurance (OASDI or Social Security), 42 U. S. C. § 401 *et seq.*

[3] In many States, the "level of benefits" did not raise an individual's in-

Congress also provided that a participating State could offer Medicaid benefits to individuals who fell within one of the categories for which federal assistance was available but whose income made them ineligible for aid under those programs. These individuals were deemed "less needy"[5] and could receive assistance only if their income and resources were insufficient "to meet the costs of necessary medical or remedial care and services." 79 Stat. 345; see 42 U. S. C. § 1396a(a)(10)(C), as amended. In 1965, no limit was placed on the extent to which federal reimbursement was available for optional coverage that States elected to provide to these persons who might become "medically needy."[6]

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come to the "standard of need." The standard of need determined eligibility for *some* benefits; often the benefits provided, however, were merely a fraction of the difference between the individual's income and the defined standard of need. See *Jefferson* v. *Hackney, supra.* The standards of need also typically varied from program to program.

[4] H. R. Rep. No. 213, 89th Cong., 1st Sess 66 (1965) (1965 House Report).

[5] *Id.*, at 66; see also S. Rep. No. 404, 89th Cong., 1st Sess., Pt. 1, 77 (1965) (1965 Senate Report).

[6] The 1965 Act contained certain requirements governing the comparative treatment of different beneficiaries under the Act. It provided that the medical assistance afforded to an individual who qualified under any categorical assistance program could not be different from that afforded to an individual who qualified under any other program. 79 Stat. 345; see 42 U. S. C. § 1396a(a)(10)(B)(i), as amended. In other words, the amount, duration, and scope of medical assistance provided to an individual who qualified to receive assistance for the aged could not be different from the

Since States established the income limits for the categorical assistance programs, they also established the income limits for the "categorically needy" under the Medicaid program. In addition, participating States established the eligibility standards for the optional coverage provided to the "medically needy." In § 1902(a)(17) of the Act, 42 U. S. C.

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amount, duration, and scope of benefits provided to an individual who qualified to receive assistance for the blind. "This will assure comparable treatment for all of the needy under the federally aided categories of assistance and will eliminate some of the unevenness which has been apparent in the treatment of the medical needs of various groups of the needy." 1965 House Report, *supra*, at 66. See also 1965 Senate Report, *supra*, at 77.

A similar "comparability" requirement among the aged, blind, disabled, and dependent applied to the optional distribution of benefits to the "medically needy." If a State elected to provide benefits to one group, it was obligated to provide benefits to the others, and "the determination of financial eligibility must be on a basis that is comparable as among the people who, except for their income and resources, would be recipients of money for maintenance under the other public assistance programs." 1965 House Report, *supra*, at 67; see also 1965 Senate Report, *supra*, at 77. 79 Stat. 345; 42 U. S. C. § 1396a(a)(10)(C)(i), as amended. In addition, the benefits provided to each categorical group of the medically needy were required to be equal in amount, duration, and scope. 79 Stat. 345; see 42 U. S. C. § 1396a(a)(10)(C)(ii), as amended.

In its provision for "comparability among the various categorical groups of needy people," 1965 House Report, *supra*, at 67, the Act required comparability in the criteria used to determine eligibility for each group. 79 Stat. 346; see 42 U. S. C. § 1396a(a)(17), as amended. See also 1965 House Report, *supra*, at 67; 1965 Senate Report, *supra*, at 77 ("Although States may set a limitation on income and resources which individuals may hold and be eligible for aid, they must do so by maintaining a comparability among the various categorical groups of needy people.") Finally, the Act provided that the assistance provided to the "medically needy" could not be greater in amount, duration, or scope than the assistance provided to the "categorically needy." 79 Stat. 345; see 42 U. S. C. § 1396a(a)(10)(B)(ii), as amended. "This was included in order to make sure that the most needy in a State receive no less comprehensive care than those who are not as needy." 1965 House Report, *supra*, at 67; see also 1965 Senate Report, *supra*, at 77.

§ 1396a(a)(17), however, Congress set forth certain requirements governing state standards for determining eligibility. In particular, Congress required States to "provide for flexibility in the application of such standards with respect to income by taking into account, except to the extent prescribed by the Secretary, the costs (whether in the form of insurance premiums or otherwise) incurred for medical care or any other type of remedial care recognized under State law." 79 Stat. 346; see 42 U. S. C. § 1396a(a)(17).[7]

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[7] In its discussion of this portion of the statute, the 1965 House Report explains:

"The bill also contains a provision designed to correct one of the weaknesses identified in the medical assistance for the aged program. Under the current provisions of Federal law, some States have enacted programs which contain a cutoff point on income which determines the financial eligibility of the individual. Thus, an individual with an income just under the specified limit may qualify for all of the aid provided under the State plan. Individuals, however, whose income exceeds the limitation adopted by the State are found ineligible for the medical assistance provided under the State plan even though the excess of the individual's income may be small when compared with the cost of the medical care needed. In order that all States shall be flexible in the consideration of an individual's income, your committee bill requires that the States standards for determining eligibility for and the extent of medical assistance shall take into account, except to the extent prescribed by the Secretary, the cost—whether in the form of insurance premiums or otherwise—incurred for medical care or any other type of remedial care recognized under State law. Thus, before an individual is found ineligible for all or part of the cost of his medical needs, the State must be sure that the income of the individual has been measured in terms of both the State's allowance for basic maintenance needs and the cost of the medical care he requires." *Id.*, at 68.

See also 1965 Senate Report, *supra*, at 78–79. To this extent, the House Report mirrors the statutory language. In further describing this provision, however, the House Report immediately continues:

"The State may require the use of all the excess income of the individual toward his medical expenses, or some proportion of that amount. In no event, however, with respect to either this provision or that described below with reference to the use of deductibles for certain items of medical service, may a State require the use of income or resources which would

Most States promptly elected to participate in the Medicaid program.[8] Many of these States also chose to provide Medicaid coverage to the "medically needy." Within a year, Congress recognized that it was fiscally improvident to rely exclusively on the States to set income limits for both aspects of the Medicaid program. See H. R. Rep. No. 2224, 89th Cong., 2d Sess. 1–3 (1966). It cautioned States "to avoid unrealistic levels of income and resources for title XIX eligibility purposes." *Id.*, at 3.

B

In 1967, Congress placed a limit on federal participation in the Medicaid program. Representative Mills introduced a bill, sponsored by the Johnson Administration, that would have made significant changes in both the Medicaid program and the categorical assistance programs. H. R. 5710, 90th Cong., 1st Sess. (1967). Under § 220 of H. R. 5710, a State participating in the Medicaid program would have been entitled to receive federal financial assistance for providing Medicaid benefits only to those persons whose income, after deduction of incurred medical expenses, was less than 150% of the highest of the State's categorical assistance standards of need.[9] Section 202 of the bill would have required States to

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bring the individual below the test of eligibility under the State plan. If the test of eligibility should be $2,000 a year, an individual with income in excess of that amount shall not be required to use his income to the extent he has remaining less than $2,000. This action would reduce the individual below the level determined by the State as necessary for his maintenance." *Ibid.*

See also 1965 Senate Report, *supra*, at 79. This additional comment has no direct foundation in the statutory language of § 1902(a)(17). See 42 U. S. C. § 1396a(a)(17).

[8] See H. R. Rep. No. 544, 90th Cong., 1st Sess. 117 (1967) (1967 House Report).

[9] This provision, of course, would have had no effect on the "categorically needy," since their income was necessarily less than 150% of the highest categorical assistance standard of need.

revise annually the standards of need under each of the categorical assistance programs to reflect changes in the costs of living and, in some circumstances, to pay 100% of the standard of need established under the programs. In support of this provision, the Secretary of the Department of Health, Education, and Welfare explained that "33 States provide less support for needy children [under the AFDC program] than the standards the States themselves have set as necessary to meet basic human needs."[10]

After extensive consideration, the House Ways and Means Committee reported out a substantially revised bill. H. R. 12080, 90th Cong., 1st Sess. (1967). The Committee Report described its primary proposed limitation on federal participation:

> "Your committee is proposing . . . that Federal sharing will not be available for families whose income exceeds 133⅓ percent of the highest amount ordinarily paid to a family of the same size (without any income and resources) in the form of money payments under the AFDC program. (AFDC income limits are, generally speaking, the lowest that are used in the categorical assistance programs)." 1967 House Report, *supra*, at 119.

As noted, see n. 10, *supra*, the amount of benefits *paid* in many States was less than the qualifying standard of need.[11]

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[10] *President's Proposals for Revision in the Social Security System: Hearings on H. R. 5710 Before the House Comm. on Ways and Means*, 90th Cong., 1st Sess. 118 (1967). In January 1965, there were 21 States that paid less that 75% of the standard of need established for a family of four under the State's AFDC program. *Id.*, at 119.

[11] The proposed bill also provided another limit on federal participation. It included a provision that set "a figure of 133⅓ percent of the average per capita income of a State as the upper limit on Federal sharing when applied to a family of four under the title XIX program." 1967 House Report, *supra*, at 119. It is noteworthy that these proposals were not an insignifi-

The Committee Report explained the reasons for the move to limit federal participation in the Medicaid program. After noting that a few States had provided benefits beyond that anticipated by Congress, it stated:

> "Your committee expected that the State plans submitted under title XIX would afford better medical care and services to persons unable to pay for adequate care. It neither expected nor intended that such care would supplant health insurance presently carried or presently provided under collective bargaining agreements for individuals and families in or close to an average income range. Your committee is also concerned that the operation of some State plans may greatly reduce the incentives for persons aged 65 or over to participate in the supplementary medical insurance program [Medicare] of title XVIII of the Social Security Act, which was also established by the Social Security Amendments of 1965. The provisions of the bill are directed toward eliminating, insofar as Federal sharing is concerned, these clearly unintended and, in your committee's judgment, undesirable actual and potential effects of the legislation." *Id.*, at 118.

In States that paid less than 75% of the AFDC standard of need, the House provision would have provided Medicaid benefits only to persons whose income, after deduction of incurred medical expenses, was less than the AFDC standard of need.[12]

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cant part of what was—admittedly—a complex bill. In setting forth at the outset the "principal purposes of the bill," the House Report provides:

"Fifth, to modify the program of medical assistance to establish certain limits on Federal participation in the program and to add flexibility in administration, the bill would—

"(a) Impose a limitation on Federal matching at an income level related to payments for families receiving aid to families with dependent children or to the per capita income of the State, if lower." *Id.*, at 5.

[12] If the House bill applied to both the categorically needy and the medi-

The Committee proposal was severely criticized on the House floor.[13] It nevertheless was passed by the House and sent to the Senate.[14] The Senate returned a substantially different bill and the matter was referred to conference.[15]

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cally needy, it could have resulted in the denial of Medicaid benefits to certain categorically needy individuals who—although eligible for assistance under the State's standard of need—had an income that was higher than 133⅓ percent of the amount the State actually *paid* to a qualifying individual with no income. The House bill did not, however, alter § 1902(a)(10) of the Act, 42 U. S. C. § 1396a(a)(10), which required participating States to provide Medicaid benefits to all of the categorically needy.

[13] See 113 Cong. Rec. 23065 (1967)(remarks of Rep. King); *id.*, at 23077 (remarks of Rep. Burke); *id.*, at 23082 (remarks of Rep. Vanik); *id.*, at 23084 (remarks of Rep. Bingham); *id.*, at 23087 (remarks of Rep. Halpern); *id.*, at 23093 (remarks of Rep. Ryan); *id.*, at 23104 (remarks of Rep. Bingham); *id.*, at 23125 (remarks of Rep. Boland); *id.*, at 23128 (remarks of Rep. Kastenmeier). In particular, see *id.*, at 23131 (remarks of Rep. Farbstein); *id.*, at 23083 (remarks of Rep. Gilbert); *id.*, at 23092 (remarks of Rep. Burton).

[14] Representative Mills defended the bill against criticism that its treatment of those with income above the categorical assistance limit was unfair. He noted that it was "only because of what we walked into with this program that the committee has seen fit to put limits on it," *id.*, at 23093, and added: "I do not think it is fair to tax people through the general funds of the Treasury to pay for the medical costs of those who undoubtedly have the means to buy insurance and to defray their own medical costs." *Ibid.* See also *id.*, at 23061–23062 (remarks of Rep. Byrnes); *id.*, at 23084–23085 (remarks of Rep. Hanley); *id.*, at 23090 (remarks of Rep. Stratton); *id.*, at 23090, 23091 (remarks of Rep. McCarthy); *id.*, at 23105 (remarks of Rep. Taft); *id.*, at 22783 (remarks of Rep. Quillen).

[15] In hearings before the Senate Finance Committee, an HEW official recommended that the Administration's proposal be adopted. He criticized the House bill and noted that, in States such as Indiana and Texas, 133% of the AFDC payment amount was less than the AFDC standard of need. *Social Security Amendments of 1967: Hearings on H. R. 12080 Before the Senate Comm. on Finance*, 90th Cong., 1st Sess. 280 (1967). He pointed out that such a standard could result in exclusion of some of the categorically needy, which he suggested probably had not been intended. *Ibid.* Senator Robert Kennedy also criticized the House proposal, noting that medically needy individuals would not be eligible for Medicaid in some States until their income, after deduction of incurred medical expenses,

The Conference Committee adopted the House 133⅓ percent AFDC payment standard. H. R. Conf. Rep. No. 1030, 90th Cong., 1st Sess. 63 (1967). It added, however, an express exception for the categorically needy. *Ibid.* Opposition to the Conference proposal was voiced in both the House and the Senate.[16] The 133⅓ AFDC payment standard nevertheless was approved by Congress and enacted into law as § 1903(f) of the Social Security Act. See 81 Stat. 898; 42 U. S. C. § 1396b(f), as amended.[17]

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was less than the standards of need established for the categorically needy. *Id.*, at 784.

The Finance Committee subsequently proposed a bill that provided participating States with federal assistance for Medicaid expenditures made on behalf of any person whose income after the deduction of medical expenses was less than 150% of the OAA assistance standard, which generally was the highest of the cash assistance standards. See S. Rep. No. 744, 90th Cong., 1st Sess. 177 (1967). The Senate bill also introduced a new formula for computing the amount of federal reimbursement under the Medicaid program that was designed to reduce federal matching funds for payments to the medically needy. *Id.*, at 176–177.

The proposals encountered resistance on the Senate floor. Senator Javits, speaking in support of an amendment offered by Senator Kuchel that would have substituted the proposals of the Administration, criticized the Finance Committee bill on the ground that it discriminated against the medically needy. See 113 Cong. Rec. 33168, 33169 (1967). In response, Senator Long acknowledged that the bill discriminated against the medically needy, but explained that it "encourages the State to concentrate its medical assistance for those who are most in need, those who qualify for public welfare assistance." *Id.*, at 33169, 33171. The Senate rejected the Kuchel amendment and adopted the Finance Committee bill.

[16] See 113 Cong. Rec. 36380 (1967)(remarks of Rep. Burton); *id.*, at 36381 (remarks of Rep. Gilbert); *id.*, at 36385 (remarks of Rep. Reid); *id.*, at 36387 (remarks of Rep. Ryan); *id.*, at 36389 (remarks of Rep. Farbstein). In the Senate, Robert Kennedy complained that in Mississippi the 133⅓ percent limitation amounted to an income level, after medical expenses had been incurred, of $80 per month for a family of four. *Id.*, at 36784. Senator Mondale quoted the testimony in the Senate Hearings, see n. 15, *supra*, that in some States the 133⅓ percent AFDC payment amount was less than the standard of need established under even the AFDC program. *Id.*, at 36819.

[17] As amended, 42 U. S. C. § 1396b(f) provides:

C

In 1972, Congress replaced three of the four state-administered categorical assistance programs with a new federal program entitled Supplemental Security Income for the Aged,

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"Limitation on Federal participation in medical assistance

"(f)(1)(A) Except as provided in paragraph (4), payment under the preceding provisions of this section shall not be made with respect to any amount expended as medical assistance in a calendar quarter, in any State, for any member of a family the annual income of which exceeds the applicable income limitation determined under this paragraph.

"(B)(i) Except as provided in clause (ii) of this subparagraph, the applicable income limitation with respect to any family is the amount determined, in accordance with standards prescribed by the Secretary, to be equivalent to 133⅓ percent of the highest amount which would ordinarily be paid to a family of the same size without any income or resources, in the form of money payments, under the plan of the State approved under Part A of subchapter IV of this chapter.

. . . . .

"(2) In computing a family's income for purposes of paragraph (1), there shall be excluded any costs (whether in the form of insurance premiums or otherwise) incurred by such family for medical care or for any other type of remedial care recognized under State law.

. . . . .

"(4) The limitations on payment imposed by the preceding provisions of this subsection shall not apply with respect to any amount expended by a State as medical assistance for any individual—

"(A) who is receiving aid or assistance under any plan of the State approved under subchapter I, X, XIV or XVI, or part A of subchapter IV, or with respect to whom supplemental security income benefits are being paid under subchapter XVI of this chapter, or

"(B) who is not receiving such aid or assistance, and with respect to whom such benefits are not being paid, but (i) is eligible to receive such aid or assistance, or to have such benefits paid with respect to him, or (ii) would be eligible to receive such aid or assistance, or to have such benefits paid with respect to him if he were not in a medical institution, or

"(C) with respect to whom there is being paid, or who is eligible, or would be eligible if he were not in a medical institution, to have paid with respect to him, a State supplementary payment and is eligible for medical assistance equal in amount, duration, and scope to the medical assistance made available to individuals described in section 1396a(a)(10)(A) of this title, but only if the income of such individual (as determined under section

Blind, and Disabled (SSI), 42 U. S. C. 1381 *et seq.*[18] The SSI program establishes a federally guaranteed minimum income for the aged, blind, and disabled. See *Schweiker* v. *Wilson*, 450 U. S. 221, 223. Under the program, however, the States may (and in some cases must) raise that minimum standard and supplement the benefits provided by the Federal Government. See 42 U. S. C. § 1382e. Moreover, if supplemental payments are made to persons who would be eligible for SSI benefits except for the amount of their income, the State also may provide Medicaid benefits to those persons. See 42 U. S. C. § 1396a(a)(10)(III).[19]

1382a of this title, but without regard to subsection (b) thereof) does not exceed 300 percent of the supplemental security income benefit rate established by section 1382(b)(1) of this title,

at the time of the provision of the medical assistance giving rise to such expenditure."

[18] The SSI program is funded and administered by the Federal Government. As its name indicates, it replaced the categorical assistance programs for the aged, the blind, and the disabled. The AFDC program continues to be administered by the States and is only partially funded by the Federal Government.

In some States the number of individuals eligible for SSI was significantly greater than the number of persons who had been eligible under the state-administered categorical assistance programs. See *Schweiker* v. *Gray Panthers*, 453 U. S. 34, 38. Since recipients of categorical welfare assistance are also entitled to Medicaid benefits, the expansion of general welfare accomplished by the SSI program increased Medicaid obligations for some States. To guarantee that States would not, for that reason, withdraw from the Medicaid program, Congress offered what has become known as the "§ 209(b) option." Under it, States may elect to provide Medicaid assistance only to those individuals who would have been eligible under the state Medicaid plan in effect on January 1, 1972. See *id.*, at 38–39. Thus, in some States, Medicaid is not automatically available for all of the "categorically needy." Massachusetts is not a § 209(b) State.

[19] There is a limit on federal participation in this aspect of the program. A State is entitled to federal financial assistance for providing Medicaid benefits to a state supplementary payment recipient only if his gross income is less than 300% of the applicable SSI income limitation. See 42 U. S. C. § 1396b(f)(4)(C); *supra*, n. 17.

II

The Commonwealth of Massachusetts has chosen to participate in the Medicaid program and to provide benefits—to the extent that federal financial assistance is available—to the "medically needy." The State also has elected to make supplementary payments to individuals who are eligible for SSI benefits or who would be eligible except for their income. Finally, the State has chosen to provide Medicaid benefits to those persons who receive supplemental payments. In Massachusetts, 133⅓ percent of the appropriate state AFDC payment amount is less in some cases than the combined federal SSI and state supplementary payment level.[20]

Appellees filed this suit in 1980 in federal court, contending that § 1903(f) of the Act—as applied in Massachusetts—violated the equal protection component of the Fifth Amendment.[21] Each of the appellees is either aged, blind, or disabled, but they are not categorically needy. For each appellee or his spouse was employed at one time and paid "Social Security" taxes. Each appellee (or his spouse) currently receives Social Security benefits (Federal Old-Age, Survivors, and Disability Insurance, 42 U. S. C. § 401 *et seq.*) in an amount that renders him ineligible for either SSI benefits or state supplementary payments. Appellees challenged the fact that, since 133⅓ percent of the Massachusetts AFDC payment level is for them lower than the SSI-supplementary payment level, they are ineligible for Medicaid until their income, after deduction of incurred medical expenses, is less than that of SSI-supplementary payment recipients. By reason of the Social Security benefits that they receive, appellees thus have less income available for non-medical expenses than individuals who—possibly because they never worked and receive no Social Security benefits—are dependent upon public assistance for support.[22]

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[20] There is no statutory requirement that state AFDC payment amounts be comparable to state supplemental benefits.

[21] See *Bolling* v. *Sharpe*, 347 U. S. 497, 499. Appellees also contended that certain state statutory provisions violated the Equal Protection Clause of the Fourteenth Amendment.

The District Court granted appellees' motion for partial summary judgment.[23] It ruled that the Massachusetts Medicaid program was unconstitutional insofar as it forced Social

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[22] Appellees alleged that federal and state provisions require an individual to apply for and to accept all Social Security benefits for which he is eligible as a condition of application for SSI and Medicaid benefits. See 42 U. S. C. § 1382(e)(2).

Appellees' grievances are best illustrated by the situation of appellee Hunter. The District Court found that Hunter had worked for 41 years and had paid Social Security taxes during that period. As a result, he received at the time of trial $534 per month in Social Security benefits, $20 of which apparently was disregarded in computing eligibility for SSI and state supplementary payments. As a result of his income, Hunter was ineligible for either SSI or state supplemental payments; the "standard of need" under those programs was $513 per month. If he had qualified, he of course would also have been eligible for Medicaid. Since the applicable AFDC payment amount in Massachusetts was $300, Hunter was ineligible for Medicaid until his income, after deduction of incurred medical expenses, was no higher than $400. Hunter regularly incurred over $200 each month in medical expenses; thus, by reason of his Social Security benefits, he had less income available for non-medical needs ($400 per month) than he would have had on public assistance ($513 per month). In his case, a Social Security payment of $1 less each month ($534 less $20 less $1) would apparently have rendered him fully eligible for Medicaid. See 501 F. Supp., at 1132. In other words, if his gross income were reduced by $1, he would receive over $100 in additional medical benefits and have that additional amount of income available for non-medical needs.

[23] The District Court certified a class "consisting of all (i) present and future Social Security recipients; (ii) who reside or will reside in Massachusetts; (iii) who are or will be disabled or 65 years old or older; (iv) who are or will be ineligible because of the amount of their incomes for Massachusetts Supplemental Security Income payments; and (v) who have or will have, as determined in accordance with the applicable Massachusetts Medicaid regulations, medical expenses not subject to payment by a third party which exceed the difference between their countable incomes under the Massachusetts Medicaid regulations and the applicable Massachusetts Supplemental Security Income standard." App. to Juris. Statement 23a–24a.

Security recipients to incur medical expenses that reduced their remaining income to an amount below SSI-supplementary payment levels. 501 F. Supp. 1129. The court later declared explicitly that § 1903(f) of the Act, 42 U. S. C. § 1396b(f), is unconstitutional as applied in Massachusetts. App. to Juris. Statement 25a. We noted probable jurisdiction. —— U. S. ——.

III

In this Court, for the first time, appellees contend that the Social Security Act itself compels the conclusion that, if Medicaid services are provided to the "medically needy," those persons may not be forced to incur medical expenses that would reduce their remaining income below the applicable public assistance standard. Although appellees did not advance this argument in the District Court, they are not precluded from asserting it as a basis on which to affirm that court's judgment.[24] "Where a party raises both statutory and constitutional arguments in support of a judgment, ordinarily we first address the statutory argument in order to avoid unnecessary resolution of the constitutional issue." *Blum* v. *Bacon*, —— U. S. ——, ——. See *Harris* v. *McRae*, 448 U. S. 297, 306–307.

Appellees contend that a "fundamental Congressional purpose in the creation of the medically needy feature of Title XIX was to achieve equity between public assistance recipients and others similarly situated." Brief for Appellees 12. In support of this contention, appellees cite the requirement first imposed in 1965 that States "include reasonable standards (*which shall be comparable for all groups*) for determining eligibility for and the extent of medical assistance under the plan . . . ," 79 Stat. 346 (emphasis added), 42 U. S. C. § 1396a(a)(17), as amended, and note the statements in the legislative history that a State could not require an individual to use, for medical expenses, income "which would bring the individual below the test of eligibility under the State plan." See n. 7, *supra*.

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[24] "It is well accepted . . . that without filing a cross-appeal or cross-petition, an appellee may rely upon any matter appearing in the record in support of the judgment below." *Blum* v. *Bacon*, —— U. S. ——, ——, n. 5. The statutory argument raised by the appellees, although not presented in the District Court, may be decided on the basis of the record developed in that court.

Moreover, appellees contend that this "comparability requirement" was not changed by the enactment of § 1903(f) in 1967. Appellees argue that the separate bills passed in both the House and the Senate would have affected *both* the categorically and the medically needy.[25] Only when the Conference Committee accepted the House provision and added an exception for the categorically needy, appellees argue, did the 1967 modification potentially change the comparability requirement between the two groups. Appellees assert that such a change was not intended; rather, they argue that the exception for the categorically needy was added only to ensure that they would not be adversely affected by § 1903(f). Appellees assert that the medically needy were not similarly excepted from the 133⅓ percent rule in those States in which that figure was less than the applicable standard of need because, in 1967, those States did not have medically needy programs.

Thus, appellees urge that we construe § 1903(f) to require the medically needy to incur medical expenses until their income is 133⅓ percent of the AFDC payment amount or—to maintain comparability—100 percent of the combined SSI-state supplementary payment level *if that figure is higher*. Appellees argue that the legislative history of the 1965 and 1967 Amendments to the Social Security Act justifies a departure from the literal language of § 1903(f) and the Secretary's interpretation of that provision.

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[25] See n. 12, *supra*. Since the limitation in the Senate bill was set at 150% of the OAA assistance standard, by definition it would not likely have affected the categorically needy. In any event, appellees contend that both bills were consistent with a comparability requirement.

We cannot agree. Congress explicitly stated in § 1903(f) that federal reimbursement for benefits provided to the medically needy was available only if the income of those persons, after the deduction of incurred medical expenses, was less than 133⅓ percent of the state AFDC payment level. In specifically excepting the categorically needy from this rule, Congress recognized that this amount could be lower than categorical assistance eligibility levels. There is no basis in either the statute or the legislative history for appellees' argument that Congress implicitly "assumed" that those States in which 133⅓ percent of the AFDC payment level was less than the applicable standard of need simply would not provide assistance to the medically needy. Even if this were true in 1967, the Medicaid program then was less than two years old; Congress was aware that many States were in the process of adopting Medicaid programs.[26] To assume that Congress was unaware that § 1903(f)—which applied only to the medically needy—could operate in those States—which Congress knew existed—in which 133⅓ percent of the AFDC payment amount was less than the applicable standard of need is to demean the intelligence of the Congress. We are not prepared to interpret a statute on the basis of an unsupported assumption that Congress had little idea of what it was doing.[27]

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[26] See 1967 House Report, *supra*, at 117–118.

[27] Moreover, appellees' "congressional ignorance" argument rests on another unsupportable premise. Appellees assume that the House bill—which they admit was vigorously debated—had a "comparable" effect on the categorically and the medically needy. That bill, however, did not propose an amendment to § 1902(a)(10) of the Act, 42 U. S. C. § 1396a(a)(10), which required that Medicaid coverage be provided to *all* the categorically needy. It is much more likely—in light of § 1902(a)(10)—that the House assumed that its proposed limits on federal participation in the Medicaid program would affect only the medically needy. See *Hear-*

The literal and clear language of § 1903(f) does not conflict with any other provision of the Act. In both § 1902(a)(10) and § 1902(a)(17), see 79 Stat. 345–346, Congress required comparability among the various "categories" for which federal assistance was available, but these provisions did not require that the medically needy be treated comparably to the categorically needy in all respects. See n. 6, *supra.*[28] Indeed, such a broad comparability requirement would be inconsistent with the fact that Congress provided in 1965 that the medically needy could be excluded entirely from the Medicaid program. Moreover, § 1903(f) is not inconsistent with the congressional intent, see n. 7, *supra,* that medical expenses be considered in determining, where appropriate, an individual's eligibility for Medicaid. In § 1903(f) Congress determined that federal assistance would not be available for payments made to individuals whose income, after deduction of incurred medical expenses, was greater that 133⅓ percent of applicable state AFDC payments. Congress determined that, so long as an individual retained that level of income to meet basic needs, he need not receive reimbursement for

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ings on H. R. 12080, supra, n. 15, at 280 (describing the possibility that the House bill would affect the categorically needy as a "drafting error"). This assumption was made explicit by the Conference Committee, which chose the House standard but added—with little discussion—a direct exception for the categorically needy.

[28] Relying on 42 U. S. C. §§ 1396a(a)(10)(C)(i) and 1396(a)(17), courts have concluded that certain treatment of the medically needy must be comparable to that afforded to the categorically needy. See *Caldwell* v. *Blum,* 621 F. 2d 491 (CA2 1980), *cert. denied,* 452 U. S. 909; *Fabula* v. *Buck,* 598 F. 2d 869 (CA4 1979); *Greklek* v. *Toia,* 565 F. 2d 1259 (CA2 1977), *cert. denied,* 436 U. S. 962; *Aitchison* v. *Berger,* 404 F. Supp. 1137 (SDNY 1975), *aff'd,* 538 F. 2d 307 (CA2 1976), *cert. denied,* 429 U. S. 890. Whatever the scope of the requirement of comparability between the categorically and the medically needy, it is clear that the Act does not require the income of medically needy persons—after the deduction of incurred medical expenses—to be at least comparable to that of the categorically needy.

medical expenses. That income level might appear unreasonably low, but it is the level that Congress chose. We find no inconsistency between § 1903(f) and § 1902(a)(17).

In sum, we see no reason to ignore the literal language of § 1903(f). Moreover, this analysis is consistent with the Secretary's interpretation of that statutory provision. "We have often noted that the interpretation of an agency charged with the administration of a statute is entitled to substantial deference." *Blum* v. *Bacon*, *supra*, at ——. We hold that the discrimination challenged in this case is required by the Social Security Act.

IV

Appellees also contend—and the District Court held—that § 1903(f), as applied in Massachusetts, irrationally discriminates between the categorically and the medically needy.[29] The unfairness of the statute stems from the fact that appellees receive less medical assistance, and have less income remaining for their non-medical needs, than do SSI recipients. The unfairness is accentuated by the fact that the disfavored class consists largely of persons who worked and paid taxes to provide for their retirement while the favored class includes persons who may never have done so. Powerful equities unquestionably support the appellees' claim of unfair treatment.

A belief that an act of Congress may be inequitable or unwise is of course an insufficient basis on which to conclude that it is unconstitutional. Moreover, the validity of a broad legislative classification is not properly judged by focusing solely on the portion of the disfavored class that is affected most harshly by its terms. *Califano* v. *Jobst*, 434 U. S. 47. In this case, Congress has differentiated between the categorically needy—a class of aged, blind, disabled, or dependent persons who have very little income—and other persons with similar characteristics who are self-supporting. Members of the former class are automatically entitled to Medicaid; members of the latter class are not eligible unless a State elects to provide benefits to the medically needy and unless their income, after consideration of medical expenses, is below state standards of eligibility.[30]

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[29] The discriminatory impact challenged in this case arises solely from the fact that Massachusetts has chosen to supplement SSI payments to an extent that exceeds 133⅓ percent of state AFDC payment levels. It is not disputed that 133⅓ percent of the Massachusetts AFDC payment level is higher than federal SSI benefit levels. See 45 Fed. Reg. 31782 (1980); 46 Fed. Reg. 27076 (1981).

According to the congressional scheme, then, the medically needy may be excluded entirely from the Medicaid program. Before considering the constitutional constraints that may exist if a State chooses to provide benefits to that class, it is appropriate to confront the more basic question whether the optional character of the program for the medically needy is itself constitutionally permissible.

In establishing public assistance programs, Congress often has determined that the Federal Government cannot finance a program that provides meaningful benefits in equal measure to everyone. Both federal and state funds available for such assistance are limited. In structuring the Medicaid program, Congress chose to direct those limited funds to persons who were most impoverished and who—because of their physical characteristics—were often least able to overcome the effects of poverty. The legislative history of the 1965 Amendments makes clear that this group was not chosen for administrative convenience. "These people are the most needy in the country and it is appropriate for medical care costs to be met, first, for these people."[31] A decision to allocate medical assistance benefits only to the poor does not itself violate constitutional principles of equality; in terms of their ability to provide for essential medical services, the wealthy and the poor are not similarly situated and need not be treated the same. It is rational to distribute public assistance benefits on the basis of the income and resources available to potential recipients.

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[30] Although the arguments in this case have focused on two classes, in fact there are three: (1) the categorically needy; and (2) all others, (a) some of whom have medical expenses that reduce their remaining income to a level that qualifies them as medically needy, and (b) some of whom are neither categorically needy nor medically needy.

[31] 1965 House Report, *supra*, at 66.

In choosing to require coverage only for the categorically needy, Congress permitted States to exclude from the program many persons who—by reason of large medical expenses—often were just as much in need of medical assistance as the categorically needy. Yet Congress found these persons "less needy." 1965 House Report, *supra*, at 66. By reason of the greater income available to them, as a class these persons generally are better able to provide for their medical needs. In the legislative history of the 1967 Amendments, see *supra*, at —— and n. 14, Congress noted that these persons often are able to prepare for future medical expenses through private insurance or through participation in the Medicare program.

In *Fullington* v. *Shea*, 404 U. S. 963, this Court affirmed a decision of a three-judge District Court holding that it was constitutional for the State of Colorado to provide benefits to the categorically needy but not to the medically needy. We decided *Fullington* summarily. It is clear that a decision to allocate scarce assistance benefits on the basis of an assumption that persons with greater incomes generally are better able to prepare for future medical needs is not inconsistent with constitutional principles of equal treatment. In other words, it is rational to define need on the basis of income, even though some persons with greater income—who have been unable or unwilling to save enough of their earnings to prepare for future medical needs—may actually be in greater need of assistance than those with less gross income. Although some "medically needy" persons have less income available for non-medical expenses than those who receive categorical assistance, the broad legislative classification does not involve the type of arbitrariness that is constitutionally offensive.[32]

Appellees do not challenge the decision in *Fullington*. They do not contend that it is irrational to deny benefits entirely to the medically needy. Thus, they do not challenge the line drawn by Congress to separate the class that receives favored treatment from the class that does not. Appellees attack only the manner in which one of the separate classes is affected by the program. They argue that if medical benefits are made available to a class of persons who are not categorically needy, it is constitutionally impermissible to deny them benefits if their income, after the deduction of incurred medical expenses, is lower than that of an individual who receives public assistance.

In view of the unchallenged decision in *Fullington*, appellees' constitutional argument is self-defeating. The injury that they regard as inconsistent with constitutional principles of equal treatment could be avoided by denying them *all* Medicaid benefits, thus placing them in a worse position financially than they are in now. No interest in "equality" could be furthered by such a result. If a State may deny all benefits to the medically needy—while providing benefits to the categorically needy and rendering some persons who are on public assistance better off than others who are not—a

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[32] See *Schweiker* v. *Wilson*, 450 U. S. 221, 238 ("This Court has granted a 'strong presumption of constitutionality' to legislation conferring monetary benefits, *Mathews* v. *De Castro*, 429 U. S., at 185, because it believes that Congress should have discretion in deciding how to expend necessarily limited resources.") The fact that the recipient of a governmental benefit—such as an indigent defendant who is represented by a public defender—may in some cases be better off after receiving the benefit than a wealthier person who did not qualify to receive it does not undermine the validity of the basis for determining eligibility.

State surely may narrow the gap between the two classes by providing partial benefits to the medically needy, even though certain members of that class may remain in a position less fortunate than those on public assistance.

The validity of the distinction between the categorically needy and the medically needy is not undermined by § 1903(f), because the impact of that provision falls entirely on persons who are not within the categorically needy class. See n. 30, *supra*. The function of the 133⅓ percent AFDC payment rule is to place a limit on the availability of reimbursement for potential members of the "medically needy" class. That rule prevents some persons (although not the appellees) from qualifying as medically needy; it also determines the extent to which the medically needy are reimbursed for their medical expenses. Yet appellees do not challenge the fact that, among persons who do not receive public assistance, some are treated differently from others. In other words, they do not complain of any discrimination within the class (all persons who are not categorically needy) in which the rule performs its entire function.[33] Nor do they argue that Congress chose an eligibility level that is unrelated to ability to provide for medical needs.

The fact that Massachusetts, unlike the State of Colorado in *Fullington*, has provided Medicaid benefits to the medically needy—and in doing so has defined eligibility for persons who are not categorically needy on the basis of incurred medical expenses—does not force it to make immediate medical need the sole standard in its entire Medicaid program. Massachusetts in essence has determined that those individuals whose gross income is greater than public assistance levels are ineligible for Medicaid, *unless medical expenses in any computation period reduce available income to 133⅓ percent of the state AFDC payment level.* By adding the qualifying clause, which the State of Colorado did not, Massachusetts did not offend any constitutional interest in equality. Accordingly, without endorsing the wisdom of the particular standard that Congress selected—a matter that is not for us to consider—we conclude that it violates no constitutional command. The judgment of the District Court is reversed. The case is remanded for further proceedings consistent with this opinion.

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[33] The fact that the amount of benefits payable to persons within the medically needy class is determined on the basis of income remaining *after* medical expenses have been incurred does not impeach the rationality of defining the basic distinction between the categorically needy and all others on the basis of income *before* medical expenses are considered.

It is so ordered.

All issues available have
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scattered missing issues
are no longer available.

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(Slip Opinion)

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Lumber Co.*, 200 U. S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

BLUE SHIELD OF VIRGINIA ET AL. *v.* McCREADY

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 81-225. Argued March 24, 1982—Decided June 21, 1982

Respondent employee was provided coverage under a prepaid group health plan purchased by her employer from petitioner Blue Shield of Virginia (Blue Shield). The plan provided reimbursement for part of the cost incurred by subscribers for outpatient treatment for mental and nervous disorders, including psychotherapy. However, Blue Shield's practice was to reimburse subscribers for services provided by *psychiatrists* but not by *psychologists* unless the treatment was supervised by and billed through a physician. Respondent was treated by a clinical psychologist and submitted claims to Blue Shield for the costs of the treatment. After the claims were routinely denied because they had not been billed through a physician, respondent brought a class action in Federal District Court, alleging that Blue Shield and petitioner Neuropsychiatric Society of Virginia, Inc., had engaged in an unlawful conspiracy in violation of § 1 of the Sherman Act to exclude psychologists from receiving compensation under Blue Shield's plans. She further alleged that Blue Shield's failure to reimburse was in furtherance of the conspiracy and had caused injury to her business or property for which she was entitled to treble damages under § 4 of the Clayton Act, which provides for recovery of such damages by "[a]ny person" injured "by reason of anything" prohibited in the antitrust laws. The District Court granted petitioners' motion to dismiss, holding that respondent had no standing under § 4 to maintain her suit. The Court of Appeals reversed.

Held: Respondent has standing to maintain the action under § 4 of the Clayton Act. Pp. 5–18.

(a) The lack of restrictive language in § 4 reflects Congress' expansive remedial purpose of creating a private enforcement mechanism to deter violators and deprive them of the fruits of their illegal actions, and to provide ample compensation to victims of antitrust violations. In the

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absence of some articulable consideration of statutory policy suggesting a contrary conclusion in a particular factual setting, § 4 is to be applied in accordance with its plain language and its broad remedial and deterrent objectives. Pp. 5–7.

(b) Permitting respondent to proceed does not offer the slightest possibility of a duplicative exaction from petitioners, *Hawaii* v. *Standard Oil Co.*, 405 U. S. 251, and *Illinois Brick Co.* v. *Illinois*, 431 U. S. 720, distinguished, since she had paid her psychologist, who thus was not injured by Blue Shield's refusal to reimburse respondent. And whatever the adverse effect of Blue Shield's actions on respondent's employer, who purchased the plan, it is not the employer as purchaser, but his employees as subscribers, who are out of pocket as a consequence of the plan's failure to pay benefits. Pp. 7–9.

(c) In determining whether a particular injury is too remote from the alleged violation to warrant § 4 standing, consideration is to be given (1) to the physical and economic nexus between the alleged violation and the harm to the plaintiff, and, (2) more particularly, to the relationship of the injury alleged with those forms of injury about which Congress was likely to have been concerned in making defendant's conduct unlawful and in providing a private remedy under § 4. Pp. 9–12.

(d) Respondent's injury is not rendered "remote" merely because the alleged goal of petitioners was to halt encroachment by psychologists into a market that physicians and psychiatrists sought to preserve for themselves. Here, the § 4 remedy cannot reasonably be restricted to those competitors whom petitioners hoped to eliminate from the market. Denying reimbursement to subscribers for the cost of treatment was the very means by which it is alleged that Blue Shield sought to achieve its alleged illegal ends, and respondent's injury was precisely the type of loss that the claimed violations would be likely to cause. Nor is the § 4 remedy unavailable to respondent on the asserted ground that standing should be limited to participants in the restrained market in group health care plans—that is, to entities, such as respondent's employer, who were purchasers of group health plans. Respondent did not allege a restraint in the market for group health plans, but instead premised her claim on the concerted refusal to reimburse under a plan that would permit reimbursement for psychologists' services. As a consumer of psychotherapy services entitled to financial benefits under the Blue Shield plan, she was within that area of the economy endangered by the breakdown of competitive conditions resulting from Blue Shield's selective refusal to reimburse. Pp. 12–15.

(e) Section 4 standing is not precluded on the asserted ground that respondent's injury does not reflect the "anticompetitive" effect of the alleged boycott. Her injury was of a type that Congress sought to redress in providing a private remedy for violations of the antitrust laws. Respondent did not yield to Blue Shield's coercive pressure to induce its subscribers into selecting psychiatrists over psychologists for the services they required, but instead bore Blue Shield's sanction in the form of an increase in the net cost of her psychologist's services. In light of the conspiracy here alleged, respondent's injury "flows from that which makes defendants' acts unlawful," *Brunswick Corp.* v. *Pueblo Bowl-O-Mat, Inc.*, 429 U. S. 477, 489, and falls squarely within the area of congressional concern. Pp. 15–18.

649 F. 2d 228, affirmed.

BRENNAN, J., delivered the opinion of the Court, in which WHITE, MARSHALL, BLACKMUN, and POWELL, JJ., joined. REHNQUIST, J., filed a dissenting opinion, in which BURGER, C. J., and O'CONNOR, J., joined. STEVENS, J., filed a dissenting opinion.

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SUPREME COURT OF THE UNITED STATES

No. 81-225

BLUE SHIELD OF VIRGINIA, ET AL., PETITIONERS *v.* CAROL McCREADY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

[June 21, 1982]

JUSTICE BRENNAN delivered the opinion of the Court.

The antitrust complaint at issue in this case alleges that a group health plan's practice of refusing to reimburse subscribers for psychotherapy performed by psychologists, while providing reimbursement for comparable treatment by psychiatrists, was in furtherance of an unlawful conspiracy to restrain competition in the psychotherapy market. The question presented is whether a subscriber who employed the services of a psychologist has standing to maintain an action under § 4 of the Clayton Act based upon the plan's failure to provide reimbursement for the costs of that treatment.

I

From September 1975 until January 1978, respondent Carol McCready was an employee of Prince William County, Virginia. As part of her compensation, the county provided her with coverage under a prepaid group health plan purchased from petitioner Blue Shield of Virginia (Blue Shield).[1] The plan specifically provided reimbursement for a portion of the cost incurred by subscribers with respect to outpatient treatment for mental and nervous disorders, including psychotherapy. Pursuant to this provision, Blue Shield reimbursed subscribers for psychotherapy provided by *psychiatrists*. But Blue Shield did not provide reimbursement for the services of *psychologists* unless the treatment was supervised by and billed through a physician.[2] While a subscriber to the plan, McCready was treated by a clinical psychologist. She submitted claims to Blue Shield for the costs of that treatment, but those claims were routinely denied because they had not been billed through a physician.[3]

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[1] With petitioner Blue Shield of Southwestern Virginia.

In 1978, McCready brought this class action in the United States District Court for the Eastern District of Virginia, on behalf of all Blue Shield subscribers who had incurred costs for psychological services since 1973 but who had not been reimbursed.[4] The complaint alleged that Blue Shield and petitioner Neuropsychiatric Society of Virginia, Inc., had engaged in an unlawful conspiracy in violation of § 1 of the Sherman Act, 15 U. S. C. § 1,[5] "to exclude and boycott clinical psychologists from receiving compensation under" the Blue Shield plans. App. 55. McCready further alleged that

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[2] Petitioners contend that the contract between the county and Blue Shield must be read to bar payments for the services of nonphysicians. Respondent counters that between 1962 and 1972 Blue Shield routinely reimbursed subscribers for psychotherapy provided by psychologists, and that this practice was revised in 1972 as a result of the alleged conspiracy. In addition, respondent notes that in 1973 the Virginia legislature passed a "freedom of choice" statute, Va. Code § 32.1–824, that required Blue Shield to pay for services rendered by licensed psychologists. See *Virginia Academy of Clinical Psychologists* v. *Blue Shield of Virginia*, 624 F. 2d 476, 478 (CA4 1980). She argues that Blue Shield's obligations must be read consistently with that statute, at least until that statute was held invalid in *Blue Cross of Virginia* v. *Commonwealth*, 221 Va. 349, 269 S.E. 2d 827 (1980). This case arises on a motion to dismiss. We therefore assume, as McCready has alleged, that but for the alleged conspiracy to deny payment, she would have been reimbursed by Blue Shield for the cost of her psychologist's services.

[3] Blue Shield inadvertantly paid apparently one of McCready's claims. After the error was discovered, Blue Shield sought to obtain a refund from McCready for the amount paid. 649 F. 2d 228, 230, n. 4.

[4] A similar complaint was filed by the Virginia Academy of Clinical Psychologists (VACP) and its president against the same defendants. The District Court addressed the motions to dismiss filed in each of the cases in a single opinion. The court dismissed McCready's case—thus giving rise to the appellate decision at issue in this Court—but permitted the *VACP* case to proceed to trial. Following trial, the District Court entered judg-

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ment for the defendants, *Virginia Academy of Clinical Psychologists* v. *Blue Shield*, 469 F. Supp. 552 (ED Va. 1979), but the Court of Appeals reversed with respect to defendant Blue Shield, 624 F. 2d 476 (CA4 1980). The opinion of the Court of Appeals for the Fourth Circuit in the instant case states that the opinion in *VACP* "should be read in connection with" its own opinion. 649 F. 2d, at 230. A brief recitation of the decision in the *VACP* case is thus helpful in understanding the precise nature of McCready's claim.

In *VACP*, the Court of Appeals rejected the District Court's treatment of Blue Shield as a distinct entity for purposes of determining whether a conspiracy or agreement had been shown. 624 F. 2d, at 479. The court found "that the Blue Shield Plans are combinations of physicians, operating under the direction and control of their physician members." *Ibid.*

"Blue Shield Plans are not insurance companies, though they are, to a degree, insurers. Rather, they are generally characterized as prepaid heath care plans, quantity purchasers of health care services. . . . [I]n a real and legal sense, the Blue Shield Plans are agents of their member physicians." *Id.*, at 480 (citations and footnote omitted).

With respect to the question whether the alleged Blue Shield combination was "in restraint of trade," the Court of Appeals agreed with the District Court that the rule of reason was applicable, but held that the District Court had erred in finding no liability. The Court of Appeals observed that psychologists and psychiatrists compete in the psychotherapy market, and that the decisions of Blue Shield "necessarily dictate, to some extent," who will be chosen to provide psychotherapy. *Id.*, at 485. Finding that Blue Shield's policy of denying reimbursement for the psychotherapeutic services of psychologists unless billed through physicians, was not merely a cost-containment device or simply "good medical practice," as claimed by Blue Shield, the court held that Blue Shield had violated the Sherman Act. *Ibid.*

[5] That section provides, in pertinent part, that "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal."

Blue Shield's failure to reimburse had been in furtherance of the alleged conspiracy, and had caused injury to her business or property for which she was entitled to treble damages and attorney's fees under §4 of the Clayton Act, 15 U. S. C. §15.[6]

The District Court granted petitioners' motion to dismiss, holding that McCready had no standing under §4 to maintain her suit.[7] In the District Court's view, McCready's standing to maintain a §4 action turned on whether she had suffered injury "within the sector of the economy competitively endangered by the defendants' alleged violations of the antitrust laws." App. 17. Noting that the goal of the alleged boycott was to exclude clinical psychologists from a segment of the psychotherapy market, the court concluded that the "sector of the economy *competitively* endangered" by the charged violation extended "no further that that area occupied by the psychologists." *Id.*, at 18 (emphasis in original). Thus, while McCready clearly had suffered an injury by being denied reimbursement, this injury was "too indirect and remote to be considered 'antitrust injury.'" *Ibid.*

A divided panel of the United States Court of Appeals for the Fourth Circuit reversed, holding that McCready had alleged an injury within the meaning of §4 of the Clayton Act

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[6] That section provides, in pertinent part:

"Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court . . . and shall recover three-fold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee."

[7] Petitioners have argued in this Court that under §2 of the McCarran-Ferguson Act, 15 U. S. C. §1012, their actions were exempt from the antitrust laws as part of the "business of insurance." In ruling on petitioners' motion to dismiss, the District Court concluded that respondent had adequately pleaded a boycott beyond the protection of the McCarran-Ferguson Act, 15 U. S. C. §1013(b). Respondents point out that on a full factual record the issue was resolved against the petitioners in *VACP*, *supra*, 624 F. 2d, at 483–484. The Court of Appeals did not address this question in the present case, however, and we do not reach it here.

and had standing to maintain the suit. 649 F. 2d 228 (1981). The court recognized that the goal of the alleged conspiracy was the exclusion of clinical psychologists from some segment of the psychotherapy market. But it held that the § 4 remedy was available to any person "whose property loss is directly or proximately caused by" a violation of the antitrust laws, and that McCready's loss was not "too remote or indirect to be covered by the Act." *Id.*, at 231.[8] The court thus remanded the case to the District Court for further proceedings. We granted certiorari. —— U. S. —— (1981).

II

Section 4 of the Clayton Act, 38 Stat. 731, provides a treble-damages remedy to "*[a]ny person* who shall be injured in his business or property *by reason of anything* forbidden in the antitrust laws," 15 U. S. C. § 15 (emphasis added). As we noted in *Reiter* v. *Sonotone Corp.*, 442 U. S. 330, 337 (1979), "On its face, § 4 contains little in the way of restrictive language." And the lack of restrictive language reflects Congress' "expansive remedial purpose" in enacting § 4: Congress sought to create a private enforcement mechanism that would deter violators and deprive them of the fruits of their illegal actions, and would provide ample compensation to the victims of antitrust violations. *Pfizer Inc.* v. *India*, 434 U. S. 308, 313–314 (1978). See *Brunswick Corp.* v. *Pueblo Bowl-O-Mat, Inc.*, 429 U. S. 477, 485–486 and n. 10, (1977); *Perma Mufflers* v. *Int'l Parts Corp.*, 392 U. S. 134, 139 (1968); *American Soc. of M.E.'s* v. *Hydrolevel Corp.*, —— U. S. ——, —— (1982), slip. op., at 15. As we have recognized, "[t]he statute does not confine its protection to consumers, or to purchasers, or to competitors, or to sellers. . . . The Act is comprehensive in its terms and coverage, protecting all who are made victims of the forbidden practices by whomever they may be perpetrated." *Mandeville Farms* v. *Sugar Co.*, 334 U. S. 219, 236 (1948) (citations omitted).

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[8] Addressing the "target area" limitation on antitrust standing recognized in several Courts of Appeals, see n. 14, *infra*, the court concluded that the policies underlying that limitation were not implicated by McCready's claim. 649 F. 2d, at 231–232. The dissenting judge took a contrary view of the "target area" rule. He emphasized that McCready had not described her injury "as a design or goal of any antitrust violation," but "rather as a consequence thereof." 649 F. 2d, at 232. He viewed this as the determinative factor in the proper application of the "target area" test to the facts of this case:

> "In determining who has standing to sue, the courts must look at who the illegal act was aimed to injure. A bystander, who is not the intended victim of the antitrust violation but who is injured nonetheless, cannot sue under the antitrust laws. His injury is too remote." *Id.*, at 233.

In addition, the dissent argued that McCready was not within the sector of the economy "competitively endangered" by the alleged violation, agreeing with the District Court that "she operated in a market which was unrestrained so far as she was concerned." *Id.*, at 234. Finally, the dissent reasoned that

> "[t]he price of psychologists' services to her was not increased by any act of the defendants. The fact that her Blue Shield contract . . . would not reimburse her for those services had nothing to do with the price she paid for the services, which . . . were not artificially inflated by an antitrust violation. . . . There is not even a claim that her psychologist's bills are higher than they would have been had the conspiracy not existed." *Id.*, at 235–236.

Consistent with the congressional purpose, we have refused to engraft artificial limitations on the § 4 remedy.[9] Two recent cases illustrate the point. *Pfizer Inc.* v. *India, supra*, afforded the statutory phrase "any person" its "naturally broad and inclusive meaning," *id.*, at 312, and held that it extends even to an action brought by a foreign sovereign.

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[9] In a related context we commented that "[i]n the face of the [congressional antitrust] policy this Court should not add requirements to burden the private litigant beyond what is specifically set forth by Congress. . . ." *Radovich* v. *Nat. Football League*, 352 U. S. 445, 454 (1957). See also *Radiant Burners* v. *Peoples Gas Co.*, 364 U. S. 656, 659–660 (1961) (*per curiam*) (To state a claim under § 1 of the Sherman Act, "allegations adequate to show a violation and, in a private treble damage action, that plaintiff was damaged thereby are all the law requires.")

Similarly, *Reiter* v. *Sonotone Corp.*, *supra*, rejected the argument that the § 4 remedy is available only to redress injury to commercial interests. In that case we afforded the statutory term "property" its "naturally broad and inclusive meaning," and held that a consumer has standing to seek a § 4 remedy reflecting the increase in the purchase price of goods that was attributable to a price-fixing conspiracy. 442 U. S., at 338. In sum, in the absence of some articulable consideration of statutory policy suggesting a contrary conclusion in a particular factual setting, we have applied § 4 in accordance with its plain language and its broad remedial and deterrent objectives. But drawing on statutory policy, our cases have acknowledged two types of limitation on the availability of the § 4 remedy to particular classes of persons and for redress of particular forms of injury. We treat these limitations in turn.[10]

A

In *Hawaii* v. *Standard Oil Co.*, 405 U. S. 251 (1972), we held that § 4 did not authorize a State to sue in its *parens patriae* capacity for damages to its "general economy." Noting that a "large and indeterminable part of the injury to the 'general economy'. . . is no more than a reflection of injuries to the 'business or property' of consumers, for which they may recover themselves under § 4," we concluded that "even the most lengthy and expensive trial could not . . . cope with the problems of double recovery inherent in allowing damages" for injury to the State's quasi-sovereign interests. *Id.*, at 264. See *Reiter* v. *Sonotone Corp.*, *supra*, at 342.

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[10] Permitting McCready to maintain this lawsuit will, of course, further certain basic objectives of the private enforcement scheme embodied in § 4. Only by requiring violators to disgorge the "fruits of their illegality" can the deterrent objectives of the antitrust laws be fully served. *Hanover Shoe* v. *United Shoe Mach.*, 392 U. S. 481, 494 (1968). See *Pfizer, Inc.* v. *India*, 434 U. S., at 314; *Illinois Brick Co.* v. *Illinois*, 431 U. S. 720, 746 (1977). But in addition to allowing Blue Shield to retain a palpable profit as a result of its unlawful plan, denying standing to McCready and the class she represents would also result in the denial of compensation for injuries resulting from unlawful conduct.

In *Illinois Brick Co.* v. *Illinois*, 431 U. S. 720 (1977), similar concerns prevailed. *Hanover Shoe* v. *United Shoe Mach.*, 393 U. S. 481 (1968), had held that an antitrust defendant could not relieve itself of its obligation to pay damages resulting from overcharges to a direct-purchaser plaintiff by showing that the plaintiff had passed the amount of the overcharge on to its own customers. *Illinois Brick* was an action by an indirect purchaser claiming damages from the antitrust violator measured by the amount that had been passed on to it. Relying in part on *Hawaii* v. *Standard Oil Co.*, *supra*, the Court found unacceptable the risk of duplicative recovery engendered by allowing both direct and indirect purchasers to claim damages resulting from a single overcharge by the antitrust defendant. *Illinois Brick*, *supra*, at 730–731. The Court found that the splintered recoveries and litigative burdens that would result from a rule requiring that the impact of an overcharge be apportioned between direct and indirect purchasers could undermine the active enforcement of the antitrust laws by private actions. *Id.*, at 745–747. The Court concluded that direct purchasers rather than indirect purchasers were the injured parties who as a group were most likely to press their claims with the vigor that the § 4 treble-damages remedy was intended to promote. *Id.*, at 735.

The policies identified in *Hawaii* and *Illinois Brick* plainly offer no support for petitioner here. Both cases focused on the risk of duplicative recovery engendered by allowing every person along a chain of distribution to claim damages arising from a single transaction that violated the antitrust laws. But permitting respondent to proceed in the circumstances of this case offers not the slightest possiblity of a duplicative exaction from petitioners. McCready has paid her psychologist's bills; her injury consists of Blue Shield's failure

to pay her. Her psychologist can link no claim of injury to himself arising from his treatment of McCready; he has been fully paid for his service and has not been injured by Blue Shield's refusal to reimburse her for the cost of his services. And whatever the adverse effect of Blue Shield's actions on McCready's employer, who purchased the plan, it is not the employer as purchaser, but his employees as subscribers, who are out of pocket as a consequence of the plan's failure to pay benefits.[11]

B

Analytically distinct from the restrictions on the § 4 remedy recognized in *Hawaii* and *Illinois Brick*, there is the conceptually more difficult question "of which persons have sustained injuries *too remote* [from an antitrust violation] to give them standing to sue for damages under § 4." *Illinois Brick Co.* v. *Illinois*, 431 U. S., at 728, n. 7 (emphasis added).[12] An antitrust violation may be expected to cause ripples of harm to flow through the Nation's economy; but "despite the broad wording of § 4 there is a point beyond which the wrongdoer should not be held liable." *Id.*, at 760 (BRENNAN, J., dissenting). It is reasonable to assume that Congress did not intend to allow every person tangentially affected by an antitrust violation to maintain an action to recover threefold damages for the injury to his business or property. Of course, neither the statutory language nor the legislative history of §4 offers any focused guidance on the question of which injuries are too remote from the violation and the purposes of the antitrust laws to form the predicate for a suit under §4; indeed, the unrestrictive language of the section, and the avowed breadth of the congressional purpose, cautions us not to cabin §4 in ways that will defeat its broad remedial objective. But the potency of the remedy implies the need for some care in its application. In the absence of direct guidance from Congress, and faced with the claim that a particular injury is too remote from the alleged violation to warrant §4 standing, the courts are thus forced to resort to an analysis no less elusive than that employed traditionally by courts at common law with respect to the matter of "proximate cause."[13] See *Perkins* v. *Standard Oil Co.*, 395 U. S. 642, 649 (1969); *Karseal Corporation* v. *Richfield Oil Corporation*, 221 F. 2d 358, 363 (CA9 1955). In applying that elusive concept to this statutory action, we look (1) to the physical and economic nexus between the alleged violation and the harm to the plaintiff, and, (2) more particularly, to the relationship of the injury alleged with those forms of injury about which Congress was likely to have been concerned in making defendant's conduct unlawful and in providing a private remedy under § 4.

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[11] If there is a subordinate theme to our opinions in *Hawaii* and *Illinois Brick*, it is that the feasibility and consequences of implementing particular damages theories may, in certain limited circumstances, be considered in determining who is entitled to prosecute an action brought under § 4. Where consistent with the broader remedial purposes of the antitrust laws, we have sought to avoid burdening § 4 actions with damages issues giving rise to the need for "massive evidence and complicated theories," where the consequence would be to discourage vigorous enforcement of the antitrust laws by private suits. *Hanover Shoe* v. *United Shoe Mach.*, *supra*, at 493. Thus we recognized that the task of disentangling overlapping damages claims is not lightly to be imposed upon potential antitrust litigants, or upon the judicial system. See *Hawaii* v. *Standard Oil Co.*, *supra*, at 264; *Illinois Brick* v. *Illinois*, *supra*, at 741–742. In addition, while "difficulty of ascertainment [should not be] confused with a right of recovery," *Bigelow* v. *RKO Radio Pictures*, 327 U. S. 251, 265 (1946), § 4 plainly focuses on tangible economic injury. It may therefore be appropriate to consider whether a claim rests at bottom on some abstract conception or speculative measure of harm. See *Hawaii* v. *Standard Oil*, *supra*, at 262–263 n. 14. But like the policy against duplicative recoveries, our cautious approach to speculative, abstract, or impractical damages theories has no application to McCready's suit. The nature of her injury is easily stated: As the result of an unlawful boycott, Blue Shield failed to pay the cost she incurred for the services of a psychologist. Her damages were fixed by the plan contract and, as the Court of Appeals observed, they could be "ascertained to the penny." 649 F. 2d, at 231.

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[12] We addressed two issues of "remoteness" in *Perkins* v. *Standard Oil Co.*, 395 U. S. 642 (1969). That case involved an alleged violation of the Robinson-Patman Act, 15 U. S. C. § 13. Focusing on the substantive terms of the Robinson-Patman Act, we found no warrant in its "language or purpose" to engraft an "artificial" limitation on the reach of the remedy to bar what the court below had termed a "fourth level" injury. *Id.*, at 648. We also rejected the claim that one form of damages claimed by the defendant was not the proximate result of the alleged violation. *Id.*, at 649.

The Courts of Appeals have developed a more substantial jurisprudence on the subject of "remoteness," forumulating various "tests" as aids in analysis. Among the tests employed by the lower courts are those that focus on the "directness" of the injury, *e. g.*, *Loeb* v. *Eastman Kodak Co.*, 183 F. 704, 709 (CA3 1910); *Productive Inventions, Inc.* v. *Trico Products Corp.*, 224 F. 2d 678 (CA2 1955); *Volasco Products Co.* v. *Lloyd A. Fry Roofing Co.*, 308 F. 2d 383 (CA6 1962), on its foreseeability, *e. g.*, *In re Western Liquid Asphalt Cases*, 487 F. 2d 191, 199 (CA9 1973); *Twentieth Century Fox Film Corp.* v. *Goldwyn*, 328 F. 2d 190, 220 (CA9 1964), or on whether the injury is "arguably within the zone of interests protected by the antitrust laws," *e. g.*, *Malamud* v. *Sinclair Oil Corp.*, 521 F. 2d 1142, 1152 (CA6 1975). See also n. 14, *infra* ("target area" test). The Third Circuit has concluded that "§ 4 standing analysis is essentially a balancing test comprised of many constant and variable factors and that there is no talismanic test capable of resolving all § 4 standing problems." *Bravman* v. *Basset Furn. Industries, Inc.*, 552 F. 2d 90, 99 (CA3 1977). The Third Circuit has thus rejected the definitional approach, opting instead for an analysis of the "factual matrix" presented by each case. *Ibid.* We have no occasion here to evaluate the relative utility of any of these possibly conflicting approaches toward the problem of remote antitrust injury.

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[13] The traditional principle of proximate cause suggests the use of words such as "remote," tenuous," "fortuitous," "incidental" or "consequential" to describe those injuries that will find no remedy at law. See, *e. g.*, *South Carolina Council of Milk Producers, Inc.* v. *Newton*, 360 F. 2d 414, 419 (CA4 1966). And the use of such terms only emphasizes that the principle of proximate cause is hardly a rigorous analytic tool. See *e. g.*, *Palsgraf* v. *Long Island R.R. Co.*, 248 N.Y. 339, 162 N.E. 99 (1928); *id.*, at 351–352, 162 N.E., at 103 (Andrews, J., dissenting) ("What is cause in a legal sense, still more what is a proximate cause, depend in each case upon many considerations. . . . What we do mean by the word 'proximate' is, that because of convenience, of public policy, of a rough sense of justice, the law arbitrarily declines to trace a series of events beyond a certain point."). It bears affirming that in identifying the limits of an explicit statutory remedy, legislative intent is the controlling consideration. Cf. *Merrill Lynch, Pierce, Fenner & Smith, Inc.* v. *Curran*, —— U. S. ——, ——, slip op. at 23–24 (1982); *Middlesex Sewerage Auth.* v. *Sea Clammers Assn.*, 453 U. S. 1, 13 (1981); *Transamerica Mortgage Advisors* v. *Lewis*, 444 U. S. 11, 15–16 (1979).

(1)

It is petitioners' position that McCready's injury is too "fortuitous," "incidental," and "remote" from the alleged violation to provide the basis for a § 4 action.[14] At the outset, petitioners argue that because the alleged conspiracy was directed by its protagonists at psychologists, and not at subscribers to group health plans, only psychologists might maintain suit. This argument may be quickly disposed of.

We do not think that because the goal of the conspirators was to halt encroachment by psychologists into a market that physicians and psychiatrists sought to preserve for themselves, McCready's injury is rendered "remote." The availability of the § 4 remedy to some person who claims its benefit is not a question of the specific intent of the conspirators. Here the remedy cannot reasonably be restricted to those competitors whom the conspirators hoped to eliminate from the market.[15] McCready claims that she has been the victim of a concerted refusal to pay on the part of Blue Shield, motivated by a desire to deprive psychologists of the patronage of Blue Shield subscribers. Denying reimbursement to subscribers for the cost of treatment was the very means by which it is alleged that Blue Shield sought to achieve its illegal ends. The harm to McCready and her class was clearly foreseeable; indeed, it was a necessary step in effecting the ends of the illegal conspiracy. Where the injury alleged is so integral an aspect of the conspiracy alleged, there can be no question but that the loss was precisely "'the type of loss that the claimed violations . . . would be likely to cause.'" *Brunswick Corp.* v. *Pueblo Bowl-O-Mat, Inc.*, 429 U. S., at 489, quoting *Zenith Radio Corp.* v. *Hazeltine Research*, 395 U. S., at 125.

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[14] In so arguing, petitioners advert to the "target area" test of antitrust standing that prevails in the First, Second, and Fifth Circuit Courts of Appeals. See, *e. g.*, *Pan-Islamic Trade Corp.* v. *Exxon Corp.*, 632 F. 2d 539-546 (CA5 1980); *Engine Specialties, Inc.* v. *Bombardier Ltd.*, 605 F. 2d 1, 18-19 (CA1 1979); *Calderone Enterprises Corp.* v. *United Artists Theatre Circuit, Inc.*, 454 F. 2d 1292 (CA2 1971). Petitioners place special reliance on the following frequently cited formulation of the "target area" principle:

"[I]n order to have 'standing' to sue for treble damages under § 4 of the Clayton Act, a person must be within the 'target area' of the alleged antitrust conspiracy, i. e., a person against whom the conspiracy was aimed, such as a competitor of the persons sued. Accordingly we have drawn a line excluding those who have suffered economic damage by virtue of their relationships with 'targets' or with participants in an alleged antitrust conspiracy, rather than being 'targets' themselves." *Id.*, at 1295.

Petitioners next argue that even if the § 4 remedy might be available to persons other than the competitors of the conspirators, it is not available to McCready because she was not an economic actor in the market that had been restrained. In petitioners' view, the proximate range of the violation is limited to the sector of the economy in which a violation of the type alleged would have its most direct anticompetitive effects. Here, petitioner contends that that market, for purposes of the alleged conspiracy, is the market in group health care plans. Thus, in petitioners' view, standing to redress the violation alleged in this case is limited to participants in that market—that is, to entitites, such as McCready's employer, who were purchasers of group health plans, but not to McCready as a beneficiary of the Blue Shield plan.[16]

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[15] Nor does the "target area" test applied by the Courts of Appeals "imply that it must have been the purpose of the conpirators to injure the particular individual claiming damages." See *Schwimmer* v. *Sony Corp. of America*, 637 F. 2d 41, 47–48 (CA2 1980), quoting *Twentieth Century Fox Film Corp.* v. *Goldwyn*, 328 F. 2d 190, 220 (CA9 1964).

[16] Petitioners borrow selectively from *Brunswick Corp.* v. *Pueblo Bowl-O-Mat, Inc.*, 429 U. S. 477 (1979), in arguing that McCready's § 4 claim is "unrelated to any reduction in competition caused by the alleged boycott,"

Petitioners misconstrue McCready's complaint. McCready does not allege a restraint in the market for group health plans. Her claim of injury is premised on a concerted refusal to reimburse under a plan that was, in fact, purchased and retained by her employer for her benefit, and that as a matter of contract construction and state law permitted reimbursement for the services of psychologists without any significant variation in the structure of the contractual relationship between her employer and Blue Shield.[17] See n. 2, *supra*. As a consumer of psychotherapy services entitled to financial benefits under the Blue Shield plan, we think it clear that McCready was "within that area of the economy . . . endangered by [that] breakdown of competitive conditions" resulting from Blue Shield's selective refusal to reimburse. *Multidistrict Vehicle Air Pollution M.D.L. No. 31*, 481 F. 2d 122, 129 (CA9 1973).

(2)

We turn finally to the manner in which the injury alleged reflects Congress' core concerns in prohibiting the antitrust

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because the injury she alleges "is the result of the terms of her insurance contract, and not the result of a reduction in competition." Brief for Petitioners 16. Extracting additional language from *Brunswick*, they argue that "McCready would have suffered the identical 'loss'—but no compensable 'injury'—as long as her employer, which acted independently in an unrestrained market, continued to purchase a group insurance contract that did not cover the services of clinical psychologists." *Id.*, at 16–17.

[17] Nor do we think that her employer's decision to retain Blue Shield coverage despite its continued failure to reimburse for the services of a psychologist—or indeed, her employer's unexercised option to terminate that relationship—is an intervening cause of McCready's injury. Although her employer's decision to purchase the Blue Shield plan for her benefit was in some sense a factor that contributed independently to McCready's injury, her coverage under the Blue Shield plan may, at this stage of the litigation, properly be accepted as a given, and the proper focus in evaluating her entitlement to raise a § 4 damages claim is on Blue Shield's change in the terms of the plan to link reimbursement to a subscriber's choice of one group of psychotherapists over another.

defendants' course of conduct. Petitioners phrase their argument on this point in a manner that concedes McCready's participation in the market for psychotherapy services and rests instead on the notion that McCready's injury does not reflect the "anti-competitive" effect of the alleged boycott. They stress that McCready did not visit a psychiatrist whose fees were artificially inflated as a result of the competitive advantage he gained by Blue Shield's refusal to reimburse for the services of psychologists; she did not pay additional sums for the services of a physician to supervise and bill for the psyhotherapy provided by her psychologist; and that there is no "claim that her psychologist's bills are higher than they would have been had the conspiracy not existed."[18] In promoting this argument, petitioners rely heavily on language in *Brunswick Corp.* v. *Pueblo Bowl-O-Mat, Inc.*, 429 U. S. 477 (1979).

In *Brunswick*, respondents were three bowling centers who complained that petitioner's acquisition of several financially troubled bowling centers violated § 7 of the Clayton Act by lessening competition or tending to create a monopoly. In seeking damages, "respondents attempted to show that had petitioner allowed the [acquired] centers to close, respondents' profits would have increased." *Id.*, at 481. The Court of Appeals endorsed the legal theory upon which respondents' claim was based, *id.*, at 483, holding that "any loss 'causally linked' to 'the mere presence of the violator in the market'" was compensable under § 4, *id.*, at 487. We reversed, holding that the injury alleged by respondents was not of "the type that the statute was intended to forestall." *Id.*, at 487–488, quoting *Wyandotte Co.* v. *United States*, 389 U. S. 191, 202 (1967). Indeed, the Court noted that respondents sought in damages "the profits they would have realized had competition been *reduced*." 429 U. S., at 488 (emphasis added).

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[18] 649 F. 2d, at 236 (Widener, J. dissenting).

We can agree with petitioners' view of *Brunswick* as embracing the general principle that treble-damages recoveries should be linked to the pro-competition policy of the antitrust laws. But petitioners seek to take *Brunswick* one significant step farther. In a passage upon which petitioners place much reliance, we stated that

> "for plaintiffs to recover treble damages on account of § 7 violations, they must prove more than injury causally linked to an illegal presence in the market. Plaintiffs must prove *antitrust* injury, which is to say injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful. The injury should reflect the anticompetitive effect either of the violation or of anticompetitive acts made possible by the violation. It should, in short, be 'the type of loss that the claimed violations . . . would be likely to cause.' *Zenith Radio Corp.* v. *Hazeltine Research*, 395 U. S., at 125." *Id.*, at 489 (emphasis in original; footnote omitted).

Relying on this language, petitioners reason that McCready can maintain no action under § 4 because her injury "did not reflect the anticompetitive effect" of the alleged violation.

Brunswick is not so limiting. Indeed, as we made clear in a footnote to the relied-upon passage, a § 4 plaintiff need not "prove an actual lessening of competition in order to recover. . . . [C]ompetitors may be able to prove antitrust injury before they actually are driven from the market and competition is thereby lessened." *Id.*, at 489, n. 14. Thus while an increase in price resulting from a dampening of competitive market forces is assuredly one type of injury for which § 4 potentially offers redress, see *Reiter* v. *Sonotone*, *supra*, that is not the only form of injury remediable under § 4. We think it plain that McCready's injury was of a type that Congress sought to redress in providing a private remedy for violations of the antitrust laws.

McCready charges Blue Shield with a purposefully *anticompetitive scheme*. She seeks to recover as damages the sums lost to her as the consequence of Blue Shield's attempt to pursue that scheme.[19] She alleges that Blue Shield sought to induce its subscribers into selecting psychiatrists over psychologists for the psychotherapeutic services they required[20], and that the heart of its scheme was the offer of a Hobson's choice to its subscribers. Those subscribers were compelled to choose between visiting a psychologist and forfeiting reimbursement, or receiving reimbursement by forgoing treatment by the practitioner of their choice. In the latter case, the antitrust injury would have been borne in the first instance by the competitors of the conspirators, and inevitably—though indirectly—by the customers of the competitors in the form of suppressed competition in the psychotherapy market; in the former case, as it happened, the injury was borne directly by the customers of the competitors. McCready did not yield to Blue Shield's coercive pressure, and bore Blue Shield's sanction in the form of an increase in the net cost of her psychologist's services. Although McCready was not a competitor of the conspirators, the injury she suffered was inextricably intertwined with the injury the conspirators sought to inflict on psychologists and the psychotherapy market. In light of the conspiracy here alleged we think that McCready's injury "flows from that which makes defendants' acts unlawful" within the meaning of *Brunswick*, and falls squarely within the area of congressional concern.[21]

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[19] *Brunswick* held that a claim of injury arising from the preservation or enhancement of competition is a claim "inimical to the purposes of [the antitrust] laws," *Brunswick Corp.* v. *Pueblo-Bowl-O-Mat, Inc.*, *supra*, at 488. Most obviously, McCready's claim is quite unlike the claim asserted by the plaintiff in *Brunswick* for she does not seek to label increased competition as a harm to her. Nevertheless, we agree with petitioners that the relationship between the claimed injury and that which is unlawful in the defendant's conduct, as analyzed in *Brunswick*, is one factor to be considered in determining the redressability of a particular form of injury under § 4.

[20] Or at the least, Blue Shield sought to compel McCready to employ the services of a physician in addition to those of a psychologist.

IV

Section 4 of the Clayton Act provides a remedy to "any person" injured "by reason of" anything prohibited in the antitrust laws. We are asked in this case to infer a limitation on the rule of recovery suggested by the plain language of § 4. But having reviewed our precedents and, more importantly, the policies of the antitrust laws, we are unable to identify any persuasive rationale upon which McCready might be denied redress under § 4 for the injury she claims. The judgment of the Court of Appeals is

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[21] JUSTICE REHNQUIST, dissenting, is of course correct in asserting that the "injury suffered by the plaintiff must be of the type the antitrust laws were intended to forestall," *post*, at 2. But JUSTICE REHNQUIST's dissent takes an unrealistically narrow view of those injuries with which the antitrust laws might be concerned, and offers not the slightest hint—beyond sheer *ipse dixit*—to help in determining what kinds of injury are not amenable to § 4 redress. For example, the dissent acknowledges that "a distributor who refused to go along with the retailer's conspiracy [to injure a disfavored retailer] and thereby lost the conspiring retailer's business would . . . have an action against those retailers," *post*, at 6. The dissent characterizes this circumstance as a "concerted refusal to deal," and is thus willing to acknowledge the existence of compensable injury. But the dissent's is not the only pattern of concerted refusals to deal. If a group of psychiatrists conspired to boycott a bank until the bank ceased making loans to psychologists, the bank would no doubt be able to recover the injuries suffered as a consequence of the psychiatrists' actions. And plainly, in evaluating the reasonableness under the antitrust laws of the psychiatrists' conduct, we would be concerned with its effects not only on the business of banking, but also on the business of the psychologists against whom that secondary boycott was directed.

McCready and the banker and the distributor are in many respects similarly situated. McCready alleges that she has been the victim of a concerted refusal by psychiatrists to reimburse through the Blue Shield plan. Because McCready is a consumer, rather than some other type of market participant, the dissent finds itself unwilling to acknowledge that she might have suffered a form of injury of significance under the antitrust laws. But under the circumstances of this case, McCready's participation in the market for psychotherapeutic services provides precisely that significance.

Affirmed.

SUPREME COURT OF THE UNITED STATES

No. 81-225

BLUE SHIELD OF VIRGINIA, ET AL., PETITIONERS *v.*
CAROL McCREADY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE FOURTH CIRCUIT

[June 21, 1982]

JUSTICE REHNQUIST, with whom THE CHIEF JUSTICE and JUSTICE O'CONNOR join, dissenting.

Respondent's alleged "antitrust injury" in this case arises from a health insurance coverage dispute with her insurer, petitioner Blue Shield of Virginia. Respondent's complaint is that Blue Shield reimburses its subscribers for treatment by psychiatrists, but not by psychologists unless their services are supervised and billed by treating physicians. Respondent was treated by a clinical psychologist, but when she submitted claims to Blue Shield, she was denied reimbursement.

Respondent alleged in her complaint that Blue Shield's refusal to reimburse her for the costs she incurred in obtaining the services of a psychologist furthered a conspiracy by petitioners "to exclude and boycott clinical psychologists from receiving compensation under" Blue Shield's plan. App. 55. Blue Shield's refusal-to-reimburse policy is alleged to constitute a form of economic pressure on McCready and other Blue Shield subscribers to obtain the services of psychiatrists rather than psychologists. By employing this economic pressure on Blue Shield subscribers, petitioners are alleged to have placed clinical psychologists at a competitive disadvantage with regard to psychiatrists in the market for insurance-reimbursed psychological services.

The Court concludes that McCready's inability to obtain reimbursement for the psychological services she actually obtained permits her to maintain an action to enforce the antitrust laws pursuant to § 4 of the Clayton Act. According to the Court, one who suffers economic loss as a necessary step in effecting the end of a conspiracy has "standing" to sue pursuant to § 4. *Ante*, at 13, 17. I disagree.

Section 4 of the Clayton Act authorizes suits for treble damages by "[a]ny person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws." 15 U. S. C. § 15. It is not enough, however, for a plaintiff merely to allege that the defendant violated the antitrust laws and that he was injured. *Brunswick Corp.* v. *Pueblo Bowl-O-Mat, Inc.*, 429 U. S. 477, 486–489 (1977). See *Hawaii* v. *Standard Oil Co.*, 405 U. S. 251, 263, n. 14 (1972). The injury suffered by the plaintiff must be of the type the antitrust laws were intended to forestall. *Brunswick Corp.* v. *Pueblo Bowl-O-Mat, Inc.*, *supra*, at 487–488.

> "Plaintiffs must prove *antitrust* injury, which is to say injury of the type the antitrust laws were intended to prevent and that flows from that which makes the defendants' acts unlawful. The injury should reflect the anticompetitive effect either of the violation or of anticompetititive acts made possible by the violation. It should, in short, be 'the type of loss that the claimed violations . . . would be likely to cause.'" *Id.*, at 489 (citation omitted).

Although McCready alleges that she would have been reimbursed had it not been for the conspiracy, I do not think that she has made a sufficient allegation of "antitrust injury" within the meaning of *Brunswick*.

Standing alone, a refusal by an insurer to reimburse its insured does not constitute a violation of the Sherman Act. At most, such an action on the part of an insurer may amount to a breach of a contract or a violation of relevant state law regulating the insurance industry.[1] According to the Court, however, what distinguishes this case from the typical insurance coverage dispute is either the *purpose* behind or the *effect* of Blue Shield's refusal to reimburse. If Blue Shield violated the antitrust laws by its non-reimbursement policy, it was only because that policy was used as a *means* of putting psychologists at a competitive disadvantage in relation to psychiatrists.

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[1] In addition to the antitrust claim, McCready's complaint asserts a claim

Two conceivable grounds therefore may be divined from the Court's opinion to support its conclusion that McCready has suffered "antitrust injury" when Blue Shield refused to reimburse her costs in obtaining the services of a psychologist. The first theory is that McCready may recover simply because petitioners' non-reimbursement policy was *intended* to put clinical psychologists at a competitive disadvantage. According to the Court, this must be so even if Blue Shield's refusal to reimburse her would be entirely legal under the antitrust laws in the absence of such a purpose to competitively injure third parties. Blue Shield's intent or purpose renders the discriminatory reimbursement policy illegal. Under this theory, it would seem to be irrelevant for the Court's purposes whether McCready obtained the services of a psychologist or a psychiatrist so long as the illegal intent is present and she suffered economic loss as a result.[2]

The second conceivable rationale is a flat rule that recovery is permitted by those persons who suffer economic loss as a

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for breach of contract under the principles of pendant jurisdiction. App. 57–58. She also alleges that Blue Shield's policy contravened state law. App. 55–56.

[2] The Court explains that those subscribers, such as McCready, who did not yield to Blue Shield's coercive pressures suffer from Blue Shield's sanctions by way of increased costs in obtaining the services of a psychologist. Those subscribers who did yield to Blue Shield's pressure suffer antitrust injury indirectly because of suppressed competition in the psychotherapy market. *Ante*, at 17. I do not understand the Court to conclude that *Illinois Brick Co.* v. *Illinois*, 431 U. S. 720 (1977), would not bar recovery by a subscriber, as opposed to a psychologist, in the latter situation.

necessary step in effecting a conspiracy to place third parties at a competitive disadvantage.[3] Under this theory, McCready may recover merely by demonstrating that she was a "tool" of petitioners' effort to disable psychologists from competing with psychiatrists in the market for insurance reimbursed psychological services. She may recover because she did not yield to the economic pressure imposed on her.[4] The theory is that McCready may recover because her loss is linked to petitioners' efforts to enforce a "boycott" of third parties.

I believe that such reasoning is foreclosed by the Court's decision in *Brunswick*. In order to recover, a plaintiff must demonstrate that the nature of the injury *he suffered* is of the type that makes the challenged practice illegal. In *Brunswick*, the merger may well have violated § 7 of the Clayton Act in the abstract or even as to competitors not before the Court. Yet, we held that the plaintiffs in *Brunswick* could not recover because they did not suffer from the *anticompetitive* effects of the merger. We rejected the contention that it was sufficient to show merely that the defendant's merger violated § 7 and that there existed a causal link between that merger and an economic loss. *Id.*, at 486–489. Instead, the required showing is that the type of harm suffered by the plaintiff is that which makes the challenged practice illegal. *Id.*, at 489.

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[3] The Court suggests a third theory—that McCready has standing herself as a target of a concerted refusal to deal. See *ante*, at 18, n. 21; *infra*, at 6–7.

[4] In order to recover under this theory, it would seem that respondent must prove at trial that she actually refused to yield to the economic pressure created by Blue Shield's reimbursement policy. If she decided to obtain the services of a psychologist rather than a psychiatrist without knowing of Blue Shieid's policy, it cannot be said that her "injury" was proximately related to petitioners' alleged anticompetitive conduct. If she discovered the policy only after she sought reimbursement, then it cannot be said that Blue Shield's policy had any effect on McCready's conduct as a consumer in the market for psychotherapeutic services. This, of course, is not to say that a person in all circumstances must have knowledge of a defendant's anticompetitive activities before one may challenge that activity. One may not be a victim of economic pressure, however, if one acted oblivious to that pressure.

Therefore, McCready may not recover merely by showing that she has suffered an economic loss resulting from a practice the legality of which depends upon its effect on a third party. McCready must show that the challenged practice is illegal with regard to its effect upon her. But petitioners' policy is alleged to be illegal not by virtue of of its effect upon Blue Shield's subscribers but because of its effect upon psychologists. McCready alleges no anticompetitive effect upon herself. She does not allege that the conspiracy has affected the *availability* of the psychological services she sought and actually obtained. Nor does she allege that the conspiracy affected the *price* of the treatment she received.[5] She does not allege that her injury was caused by any reduction in competition between psychologists and psychiatrists, nor that it was the result of any *success*[6] Blue Shield achieved in its "boycott" of psychologists. She seeks recovery solely on the basis that Blue Shield's reimbursement policy *failed* to alter her conduct in a fashion necessary to foreclose psychologists from obtaining the patronage of Blue Shield's subscribers.

If the important consideration is whether the challenged practice is illegal with regard to its effect on the plaintiff, then it would be irrelevant for the plaintiff's purposes that the conspiracy might also adversely affect competition on another level of the market. For example, a group of retailers may threaten to refuse to do business with those distributors that continue to do business with a disfavored retailer. If the distributors agreed to cooperate with the conspiring retailers, then the disfavored retailer would have an action against the agreeing distributors and the conspiring retailers. See, *e. g.*, *United States* v. *General Motors*, 384 U. S. 127 (1966); *Klor's* v. *Broadway-Hale Stores*, 359 U. S. 207 (1959). I would think that a distributor who refused to go along with the retailers' conspiracy and thereby lost the conspiring retailers' business would also have an action against those retailers. Such an action would be based upon the conspirators' concerted refusal to deal with the distributor which *itself* would be unlawful under the antitrust laws. Such an action, unlike the instant case, would not depend upon the anticompetitive effect of the challenged practice upon a third party. The distributor would have an action not on the ground that he was caught in the middle of an attempted boycott of participants on another level of the market, but because *he* was boycotted. The boycott of the distributor puts him at a competitive disadvantage to those distributors who are unaffected by the retailers' conspiracy and to those distributors who agree to participate.[7]

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[5] By excluding psychologists from the market, psychiatrists may well be able to increase their charges for psychotherapeutic services, which in turn, may raise the insurance rates charged by Blue Shield. McCready, however, alleges no such injury to herself on this theory.

[6] Because McCready obtained the services of a psychologist, it cannot be said that the psychologists were injured by the economic pressure Blue Shield placed on McCready and the class of subscribers she respresents. See *ante*, at 9.

McCready, however, does not allege that petitioners engaged in a concerted refusal to deal with *her*. As the Court is aware, *ante*, at 2–4, McCready has alleged that petitioners violated the antitrust laws by conspiring to exclude clinical psychologists from the coverage of Blue Shield plans, and that this conspiracy foreseeably injured her. The Court apparently concludes, however, that McCready has also sufficiently alleged that petitioners have engaged in a concerted refusal to deal with *her*, and that this is the gravamen of her antitrust complaint: "McCready alleges that she has been the victim of a concerted refusal by psychiatrists to reimburse through the Blue Shield plan." *Ante*, at 18, n. 21. It may be that the Court today is merely holding that a boycottee has "standing" to sue under § 4. Were this the issue presented by this case, I have little doubt that the Court merely would have denied certiorari.

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[7] As pointed out by the Court, a concerted refusal to deal may take many forms. *Ante*, at 18, n. 21. I would agree that the bank could sue in the Court's hypothetical because, as conceded by the Court, the bank's ability to compete with other banks would be adversely affected. By contrast, my disagreement with the Court is that it permits McCready to sue solely because of an injury to a level of the market in which she does not participate. Moreover, McCready does not allege that petitioners' conspiracy adversely affected competition between psychologists and psychiatrists in such a manner as to adversely affect the price or supply of psychotherapeutic services available to her as a consumer. Thus, McCready's case is clearly distinguishable from that of the bank's in the Court's hypothetical.

But McCready simply does not, and could not, claim standing as the target of a concerted refusal to deal. Neither Blue Shield nor the psychiatrists threatened to cease doing business with McCready if she obtained the services of a psychologist rather than a psychiatrist. McCready alleges only that under the Blue Shield policy she could not obtain reimbursement for services rendered by psychologists. If such a claim is sufficient to make out a concerted refusal to deal, then any consumer who could not obtain a product or service on the precise terms he desires could claim to be the victim of a "boycott." Most importantly, McCready alleges that Blue Shield's policy violates the antitrust laws only by virtue of its anticompetitive effect on *psychologists*. She does not allege that Blue Shield's policy is illegal in any way because of its effect on *subscribers*.

The Court, however, dismisses such concerns by stating in conclusory terms that "the injury [McCready] suffered was inextricably intertwined with the injury the conspirators sought to inflict on the psychologist and the psychotherapy market." *Ante*, at 17. I trust that the Court is not holding that a plaintiff may escape dismissal of the complaint merely by alleging that he suffered an economic loss "inextricably intertwined" with an injury the defendants intended, but failed, to inflict upon a third party.[8] Although the Court may view itself as successfully deciding this case on its peculiar facts, it has wholly failed to provide any sort of reasoned basis for its decision. Especially in the area of antitrust, labels do not suffice when analysis is necessary.

I would reverse the judgment of the Court of Appeals because McCready has not alleged that she has suffered antitrust injury, but at best injury attributable to a breach of contract on the part of Blue Shield.

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[8] If McCready's injury were truly "inextricably intertwined" with any injury actually suffered by the psychologists, the risk of duplicative recovery and the practical problems inherent in distinguishing the loss suffered by her from the loss suffered by the psychologists may mean that either subscribers or psychologists, but not both, may recover. See *Illinois Brick Co.* v. *Illinois*, 431 U. S. 720 (1977).

SUPREME COURT OF THE UNITED STATES

No. 81-225

BLUE SHIELD OF VIRGINIA, ET AL., PETITIONERS *v.* CAROL McCREADY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

[June 21, 1982]

JUSTICE STEVENS, dissenting.

Respondent is a consumer of psychotherapeutic services. The question is whether she has been injured in her "business or property by reason of anything forbidden in the antitrust laws."[1] The alleged antitrust violation is an agreement between petitioners Neuropsychiatric Society of Virginia and Blue Shield that Blue Shield would refuse to reimburse subscribers for payments made to clinical psychologists for charges that were not billed through a physician. The objective of the alleged conspiracy was to induce subscribers to patronize psychiatrists instead of psychologists.

For purposes of decision, I assume that the alleged agreement is unlawful. In analyzing the sufficiency of respondent's damage claim, it is helpful first to consider the situation in which the conspiracy would have its maximum impact on the relevant market. Given their objective, petitioners' conspiracy would be most effective if they made it perfectly clear to subscribers that they would not be reimbursed if they consulted psychologists instead of psychiatrists. For without this information, a subscriber's choice between a psychologist and a psychiatrist would not be affected by the conspiracy. Thus, I first assume that the Blue Shield insurance policy did not cover services performed by psychologists and that subscribers as a class were fully aware of this exclusion.

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[1] "Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee." 15 U. S.C. § 15.

On this assumption, a Blue Shield subscriber who is a potential consumer in the relevant market has at least three options. He may: (1) forgo treatment entirely; (2) go to a psychiatrist; or (3) go to a psychologist.[2] If he exercises his first option, his illness may worsen but he will not have suffered any economic injury cognizable under the the antitrust laws.[3] If he exercises his second option, his property will not be diminished because Blue Shield will reimburse him for his payment to the psychiatrist. If he exercises his third option, his property will be diminished to the extent of his unreimbursed payment to the psychologist, but he will have received in exchange psychotherapeutic services that presumably were worth the payment.[4] The fact that he voluntarily elected to spend money for services not covered by his insurance policy would have no greater legal significance than a similar voluntary decision by a person who was not a Blue Shield subscriber.[5] It thus seems clear to me that whatever option the fully informed subscriber exercises, he would suffer no injury to his property by reason of the restriction of insurance coverage to psychotherapeutic services performed by psychiatrists.

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[2] In *Brunswick Corp.* v. *Pueblo Bowl-O-Mat, Inc.*, 429 U. S. 477, we held that antitrust injury was limited to "the type of loss that the claimed violations . . . would be likely to cause." *Id.*, at 489 (quoting *Zenith Radio Corp.* v. *Hazeltine Research*, 395 U. S. 100, 125). I would expect that the alleged violation in this case would be most likely to cause knowledgeable members of the class of potential consumers of psychotherapeutic services to exercise either the first or the second option. It is fair to assume that the third situation—the one in which respondent finds herself—would be "unlikely" to result.

[3] The subscriber may have to undergo more extensive treatment later if he forgoes treatment now and his illness worsens. Any consequential economic injury, however, would no more constitute antitrust injury than the economic injury suffered by a consumer who decides to forgo a purchase on the ground that the price of the good or service was fixed at an artificially high level.

[4] If treatment by a psychiatrist and treatment by a psychologist were fungible, then a subscriber who exercised this third option effectively would be paying twice for the psychotherapeutic service, once to the insurer in premiums and once to the psychologist in an unreimbursable payment. But the subscriber's exercise of this option presumably indicates that treatment by a psychologist is more valuable to him than treatment by

This conclusion is reinforced by the fact that Blue Shield subscribers have the additional option of going to a psychologist while retaining their rights to reimbursement under the policy. According to respondent's complaint, Blue Shield did not refuse to reimburse all payments made by subscribers to psychologists, but only those payments not billed through a physician. Even if a fully informed subscriber's preference for psychologists over psychiatrists were protected by the antitrust laws, that preference was not denied by the antitrust violation alleged in this case.[6] The Hobson's choice described by the Court, *ante*, at 17, simply does not fit this case.

The availability of this fourth option would seem to indicate that respondent, in fact, was not fully aware of the scope of her policy's coverage. If her lack of understanding was

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a psychiatrist. If that be true, the subscriber is in the same situation as any policyholder who desires a service for which he has not purchased insurance.

[5] If the subscriber would purchase a service that was covered by the Blue Shield policy, such as a surgical operation, then he would be reimbursed by Blue Shield for that payment. If respondent's antitrust claim is that petitioners have engaged in an unlawful boycott, it therefore is manifest that respondent is not the boycottee. For petitioners have not refused to deal with respondent—they offer her the same coverage as any other subscriber or potential subscriber.

[6] Presumbly, the charge (if any) of the referring physician would be reimbursable under the policy. In any event, the complaint does not claim damages based on any such unreimbursed charge.

caused by fraud or deception, she should be able to recover in a common-law action. If the misunderstanding was her own fault, that circumstance should not provide a basis for an antitrust recovery that would not be available if she had been fully informed.

Nor is the deficiency in respondent's complaint cured if the assumption about the insurance coverage is reversed. Although her antitrust claim would be more credible if Blue Shield excluded coverage of services performed by psychologists, respondent alleged in the second count of her complaint that the insurance policy, properly construed under applicable principles of Virginia law, provided coverage for services performed by psychologists, but that Blue Shield nevertheless refused to reimburse her for the payments she made to her psychologist. If a subscriber does not suffer antitrust injury when the insurance policy excludes coverage of services performed by psychologists, it would be anomalous to conclude that the availability of a breach-of-contract claim would in any way enhance his standing. The right to recover under the federal antitrust laws cannot be derived from a right to recover under state law.

Because respondent's complaint discloses no basis for concluding that she has suffered an injury to her property by reason of the alleged antitrust violation, I respectfully dissent.

All issues available have been filmed. Unfortunately, any scattered missing issues are no longer available.

READEX FICHE

981/ 81-244

(Slip Opinion)

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Lumber Co.*, 200 U. S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

LORETTO v. TELEPROMPTER MANHATTAN CATV CORP ET AL.

APPEAL FROM THE COURT OF APPEALS OF NEW YORK

No. 81-244. Argued March 30, 1982—Decided June 30, 1982

A New York statute provides that a landlord must permit a cable television (CATV) company to install its CATV facilities upon his property and may not demand payment from the company in excess of the amount determined by a State Commission to be reasonable. Pursuant to the statute, the Commission ruled that a one-time $1 payment was a reasonable fee. After purchasing a five-story apartment building in New York City, appellant landlord discovered that appellee CATV companies had installed cables on the building, both "crossovers" for serving other buildings and "noncrossovers" for serving appellant's tenants. Appellant then brought a class action for damages and injunctive relief in a New York state court, alleging, *inter alia*, that installation of the cables insofar as appellee companies relied on the New York statute constituted a taking without just compensation. Appellee New York City, which had granted the companies an exclusive franchise to provide CATV within certain areas of the city, intervened. Upholding the New York statute, the trial court granted summary judgment to appellees. The Appellate Division of the New York Supreme Court affirmed, and on further appeal the New York Court of Appeals also upheld the statute, holding that it serves the legitimate police power purpose of eliminating landlord fees and conditions that inhibit the development of CATV, which has important educational and community benefits. Rejecting appellant's argument that a physical occupation authorized by government is necessarily a taking, the court further held that the statute did not have an excessive economic impact upon appellant when measured against her aggregate property rights, did not interfere with any reasonable investment-backed expectations, and accordingly did not work a taking of appellant's property.

Held: The New York statute works a taking of a portion of appellant's

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property for which she is entitled to just compensation under the Fifth Amendment, as made applicable to the States by the Fourteenth Amendment. Pp. 5–22.

(a) When the "character of the governmental action," *Penn Central Transportation Co.* v. *New York City*, 438 U. S. 104, 124, is a permanent physical occupation of real property, there is a taking to the extent of the occupation without regard to whether the action achieves an important public benefit or has only minimal economic impact on the owner. Pp. 6–15.

(b) To the extent that the government permanently occupies physical property, it effectively destroys the owner's rights to possess, use, and dispose of the property. Moreover, the owner suffers a special kind of injury when a *stranger* invades and occupies the owner's property. Such an invasion is qualitatively more severe than a regulation of the *use* of property, since the owner may have no control over the timing, extent, or nature of the invasion. And constitutional protection for the rights of private property cannot be made to depend on the size of the area permanently occupied. Pp. 15–19.

(c) Here, the cable installation on appellant's building constituted a taking under the traditional physical occupation test, since it involved a direct physical attachment of plates, boxes, wires, bolts, and screws to the building, completely occupying space immediately above and upon the roof and along the building's exterior wall. There is no constitutional difference between a crossover and noncrossover installation, since portions of the installation necessary for both types of installation permanently appropriated appellant's property. The fact that the New York statute applies only to buildings used as rental property does not make it simply a regulation of the use of real property. Physical occupation of one type of property but not another is no less a physical occupation. The New York statute does not purport to give the *tenant* any enforceable property rights with respect to CATV installation, and thus cannot be construed as merely granting a tenant a property right as an appurtenance to his leasehold. Application of the physical occupation rule in this case will not have dire consequences for the government's power to adjust landlord-tenant relationships, since it in no way alters the usual analysis governing a State's power to require landlords to comply with building codes. Pp. 19–21.

53 N. Y. 2d 124, 423 N. E. 2d 320, reversed and remanded.

MARSHALL, J., delivered the opinion of the Court, in which BURGER, C. J., and POWELL, REHNQUIST, STEVENS, and O'CONNOR, JJ., joined. BLACKMUN, J., filed a dissenting opinion, in which BRENNAN and WHITE, JJ., joined.

NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D.C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

SUPREME COURT OF THE UNITED STATES

No. 81-244

JEAN LORETTO, ON BEHALF OF HERSELF AND ALL OTHERS SIMILARLY SITUATED, APPELLANT *v.* TELEPROMPTER MANHATTAN CATV CORP. ET AL.

ON APPEAL FROM THE COURT OF APPEALS OF NEW YORK

[June 30, 1982]

JUSTICE MARSHALL delivered the opinion of the Court.

This case presents the question whether a minor but permanent physical occupation of an owner's property authorized by government constitutes a "taking" of property for which just compensation is due under the Fifth and Fourteenth Amendments of the Constitution. New York law provides that a landlord must permit a cable television company to install its cable facilities upon his property. N.Y. Exec. Law § 828 (1) (McKinney Supp. 1982). In this case, the cable installation occupied portions of appellant's roof and the side of her building. The New York Court of Appeals ruled that this appropriation does not amount to a taking. *Loretto* v. *Teleprompter Manhattan CATV Corp.*, 53 N.Y. 2d 124, 423 N.E. 2d 320 (1981). Because we conclude that such a physical occupation of property is a taking, we reverse.

I

Appellant Jean Loretto purchased a five-story apartment building located at 303 West 105th Street, New York, in 1971. The previous owner had granted appellees Teleprompter Corporation and Teleprompter Manhattan CATV ("Teleprompter")[1] permission to install a cable on the building and the exclusive privilege of furnishing cable television ("CATV") services to the tenants. The New York Court of Appeals described the installation as follows:

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[1] Teleprompter Manhattan CATV was formerly a subsidiary, and is now a division, of Teleprompter Corporation.

> "On June 1, 1970 TelePrompter installed a cable slightly less than one-half inch in diameter and of approximately 30 feet in length along the length of the building about 18 inches above the roof top, and directional taps, approximately 4 inches by 4 inches by 4 inches, on the front and rear of the roof. By June 8, 1970 the cable had been extended another 4 to 6 feet and cable had been run from the directional taps to the adjoining building at 305 West 105th Street." *Id.*, at 135, 423 N.E. 2d, at 324.

Teleprompter also installed two large silver boxes along the roof cables. The cables are attached by screws or nails penetrating the masonry at approximately two foot intervals, and other equipment is installed by bolts.

Initially, Teleprompter's roof cables did not service appellant's building. They were part of what could be described as a cable "highway" circumnavigating the city block, with service cables periodically dropped over the front or back of a building in which a tenant desired service. Crucial to such a network is the use of so-called "crossovers"—cable lines extending from one building to another in order to reach a new group of tenants.[2] Two years after appellant purchased the building, Teleprompter connected a "noncrossover" line—

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[2] The Court of Appeals defined a "crossover" more comprehensively as occurring:

> "when (1) the line servicing the tenants in a particular building is extended to adjacent or adjoining buildings, (2) an amplifier which is placed on a building is used to amplify signals to tenants in that building and in a neighboring building or buildings, and (3) a line is placed on a building, none of the tenants of which are provided CATV services, for the purpose of providing service to an adjoining or adjacent building." 53 N.Y. 2d, at 133, n. 6, 423 N.E. 2d, at 323, n. 6.

i. e., one that provided CATV service to appellant's own tenants—by dropping a line to the first floor down the front of appellant's building.

Prior to 1973, Teleprompter routinely obtained authorization for its installations from property owners along the cable's route, compensating the owners at the standard rate of 5% of the gross revenues that Teleprompter realized from the particular property. To facilitate tenant access to CATV, the State of New York enacted § 828 of the Executive Law, effective January 1, 1973. Section 828 provides that a landlord may not "interfere with the installation of cable television facilities upon his property or premises," and may not demand payment from any tenant for permitting CATV, or demand payment from any CATV company "in excess of any amount which the [State Commission on Cable Television] shall, by regulation, determine to be reasonable."[3] The landlord may, however, require the CATV company or the tenant to bear the cost of installation and to indemnify for any damage caused by the installation. Pursuant to § 828(1)(b), the State Commission has ruled that a one-time $1 payment is the normal fee to which a landlord is entitled. In the Matter of Implementation of Section 828 of the Executive Law, New York State Commission on Cable Television, Statement of General Policy (Jan. 15, 1976) (Statement of General Policy), App. 51–52; Clarification of General Policy (Aug. 27, 1976), App. 68–69. The Commission ruled that this nominal fee, which the Commission concluded was equivalent to what the landlord would receive if the property were condemned pursuant to New York's Transportation Corporations Law, satisfied constitutional requirements "in the absence of a special showing of greater damages attributable to the taking." Statement of General Policy, App. 52.

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[3] N.Y. Exec. Law § 828 (McKinney Supp. 1982) provides in part:

> 1. No landlord shall
>
> a. interfere with the installation of cable television facilities upon his property or premises, except that a landlord may require:
>
> i. that the installation of cable television facilities conform to such reasonable conditions as are necessary to protect the safety, functioning and appearance of the premises, and the convenience and well-being of other tenants;
>
> ii. that the cable television company or the tenant or a combination thereof bear the entire cost of the installation, operation or removal of such facilities; and
>
> iii. that the cable television company agree to indemnify the landlord for any damage caused by the installation, operation or removal of such facilities.
>
> b. demand or accept payment from any tenant, in any form, in exchange for permitting cable television service on or within his property or premises, or from any cable television company in exchange therefor in excess of any amount which the commission shall, by regulation, determine to be reasonable; or
>
> c. discriminate in rental charges, or otherwise, between tenants who receive cable television and those who do not.

Appellant did not discover the existence of the cable until after she had purchased the building. She brought a class action against Teleprompter in 1976 on behalf of all owners of real property in the state on which Teleprompter has placed CATV components, alleging that Teleprompter's installation was a trespass and, insofar as it relied on § 828, a taking without just compensation. She requested damages and injunctive relief.[4] Appellee the City of New York, which has granted Teleprompter an exclusive franchise to provide CATV within certain areas of Manhattan, intervened. The Supreme Court, Special Term, granted summary judgment to Teleprompter and the City, upholding the constitutionality of § 828 in both crossover and noncrossover situations. 98 Misc. 2d 944, 415 N.Y.S. 2d, —— N.E. 2d —— (1979). The Appellate Division affirmed without opinion. 73 A.D. 2d 849, —— N.E. 2d —— (1979).

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[4] Class action status was granted in accordance with appellant's request, except that owners of single family dwellings on which a CATV component had been placed were excluded. Notice to the class has been postponed, however, by stipulation.

On appeal, the Court of Appeals, over dissent, upheld the statute. 53 N.Y. 2d 124, 423 N.E. 2d 320 (1981). The court concluded that the law requires the landlord to allow both crossover and noncrossover installations but permits him to request payment from the CATV company under § 828(1)(b), at a level determined by the State Cable Commission, only for noncrossovers. The court then ruled that the law serves a legitimate police power purpose—eliminating landlord fees and conditions that inhibit the development of CATV, which has important educational and community benefits. Rejecting the argument that a physical occupation authorized by government is necessarily a taking, the court stated that the regulation does not have an excessive economic impact upon appellant when measured against her aggregate property rights, and that it does not interfere with any reasonable investment-backed expectations. Accordingly, the court held that § 828 does not work a taking of appellant's property. Chief Judge Cooke dissented, reasoning that the physical appropriation of a portion of appellant's property is a taking without regard to the balancing analysis courts ordinarily employ in evaluating whether a regulation is a taking.

In light of its holding, the Court of Appeals had no occasion to determine whether the $1 fee ordinarily awarded for a noncrossover installation was adequate compensation for the taking. Judge Gabrielli, concurring, agreed with the dissent that the law works a taking but concluded that the $1 presumptive award, together with the procedures permitting a landlord to demonstrate a greater entitlement, afford just compensation. We noted probable jurisdiction. —— U. S. —— (1981).

II

The Court of Appeals determined that § 828 serves the legitimate public purpose of "rapid development of and maximum penetration by a means of communication which has important educational and community aspects," 53 N.Y. 2d, at 143–144, 423 N.E. 2d, at 329, and thus is within the State's police power. We have no reason to question that determination. It is a separate question, however, whether an otherwise valid regulation so frustrates property rights that compensation must be paid. See *Penn Central Transportation Co.* v. *New York City*, 438 U. S. 104, 127–128 (1978); *Delaware, L.& W.R. Co.* v. *Morristown*, 276 U. S. 182, 193 (1928). We conclude that a permanent physical occupation authorized by government is a taking without regard to the public interests that it may serve. Our constitutional history confirms the rule, recent cases do not question it, and the purposes of the Takings Clause compel its retention.

A

In *Penn Central Transportation Co.* v. *New York City*, 438 U. S. 104 (1978), the Court surveyed some of the general principles governing the Takings Clause. The Court noted that no "set formula" existed to determine, in all cases, whether compensation is constitutionally due for a government restriction of property. Ordinarily, the Court must engage in "essentially ad hoc, factual inquiries." *Id.*, at 124. But the inquiry is not standardless. The economic impact of the regulation, especially the degree of interference with investment-backed expectations, is of particular significance. "So, too, is the character of the governmental action. A 'taking' may more readily be found when the interference with property can be characterized as a physical invasion by government, . . . than when interference arises from some public program adjusting the benefits and burdens of economic life to promote the common good." *Id.* (citation omitted).

As *Penn Central* affirms, the Court has often upheld substantial regulation of an owner's use of his own property where deemed necessary to promote the public interest. At the same time, we have long considered a physical intrusion by government to be a property restriction of an unusually serious character for purposes of the Takings Clause. Our cases further establish that when the physical intrusion reaches the extreme form of a permanent physical occupation, a taking has occurred. In such a case, "the character of the government action" not only is an important factor in resolving whether the action works a taking but is determinative.

When faced with a constitutional challenge to a permanent physical occupation of real property, this Court has invariably found a taking.[5] As early as 1871, in *Pumpelly* v. *Green Bay Company*, 13 Wall. 166 (1871), this Court held that the defendant's construction, pursuant to state authority, of a dam which permanently flooded plaintiff's property constituted a taking. A unanimous Court stated, without qualification, that "where real estate is actually invaded by superinduced additions of water, earth, sand, or other material, or by having any artificial structure placed on it, so as to effectually destroy or impair its usefulness, it is a taking, within the meaning of the Constitution." *Id.*, at 181. Seven years later, the Court reemphasized the importance of a physical occupation by distinguishing a regulation that merely restricted the use of private property. In *Northern Transportation Co.* v. *Chicago*, 99 U. S. 635 (1878), the Court held that the city's construction of a temporary dam in a river to permit construction of a tunnel was not a taking, even though the plaintiffs were thereby denied access to their premises, because the obstruction only impaired the use of plaintiffs' property. The Court distinguished earlier cases in which permanent flooding of private property was regarded as a taking, *e. g.*, *Pumpelly*, *supra*, as involving "a physical invasion of the real estate of the private owner, and a practical ouster of his possession." In this case, by contrast, "[n]o entry was made upon the plaintiffs' lot." *Id.*, at 642.

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[5] Professor Michelman has accurately summarized the case law concerning the role of the concept of physical invasions in the development of takings jurisprudence:

> "At one time it was commonly held that, in the absence of explicit expropriation, a compensable 'taking' could occur *only* through physical encroachment and occupation. The modern significance of physical occupation is that courts, while they sometimes do hold nontrespassory injuries compensable, *never* deny compensation for a physical takeover. The one incontestable case for compensation (short of formal expropriation) seems to occur when the government brings it about that its agents, or the public at large, 'regularly' use, or 'permanently' occupy, space or a thing which theretofore was understood to be under private ownership." Michelman, Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law, 80 Harv. L. Rev. 1165, 1184 (1967) (emphasis original).

See also 2 J. Sackman, Nichols' Law of Eminent Domain 6–50–6-51 (rev. 3d ed. 1980); L. Tribe, American Constitutional Law 460 (1978).

For historical discussions, see *Loretto* v. *Teleprompter Manhattan CATV Corp.*, 53 N.Y. 2d, at 157–158, 423 N.E. 2d, at 337–338 (Chief Judge Cooke, dissenting); F. Bosselman, D. Callies, & J. Banta, The Taking Issue 51 (1973); Stoebuck, A General Theory of Eminent Domain, 47 Wash. L. Rev. 553, 600–601 (1972); Dunham, Griggs v. Allegheny County in Perspective: Thirty Years of Supreme Court Expropriation Law, 1962 Sup. Ct. Rev. 63, 82; Cormack, Legal Concepts in Cases of Eminent Domain, 41 Yale L. J. 221, 225 (1931).

Since these early cases, this Court has consistently distinguished between flooding cases involving a permanent physical occupation, on the one hand, and cases involving a more temporary invasion, or government action outside the owner's property that causes consequential damages within, on the other. A taking has always been found only in the former situation. See *United States* v. *Lynah*, 188 U. S. 445, 468–470 (1903); *Bedford* v. *United States*, 192 U. S. 217, 225 (1904); *United States* v. *Cress*, 243 U. S. 316, 327–328 (1917); *Sanguinetti* v. *United States*, 264 U. S. 146, 149 (1924) (to be a taking, flooding must "constitute an actual, permanent invasion of the land, amounting to an appropriation of, and not merely an injury to, the property"); *United States* v. *Kansas City Life Insurance Co.*, 339 U. S. 799, 809–810 (1950).

In *St. Louis* v. *Western Union Telegraph Co.*, 148 U. S. 92 (1893), the Court applied the principles enunciated in *Pumpelly* to a situation closely analogous to the one presented today. In that case, the Court held that the city of St. Louis could exact reasonable compensation for a telegraph company's placement of telegraph poles on the city's public streets. The Court reasoned:

> "The use which the [company] makes of the streets is an exclusive and permanent one, and not one temporary, shifting and in common with the general public. The ordinary traveler, whether on foot or in a vehicle, passes to and fro along the streets, and his use and occupation thereof are temporary and shifting. The space he occupies one moment he abandons the next to be occupied by any other traveler. . . . *But the use made by the telegraph company is, in respect to so much of the space as it occupies with its poles, permanent and exclusive.* It as effectually and permanently dispossesses the general public as if it had destroyed that amount of ground. Whatever benefit the public may receive in the way of transportation of messages, that space is, so far as respects its actual use for purposes of highway and personal travel, wholly lost to the public. . . . It matters not for what that exclusive appropriation is taken, whether for steam railroads or street railroads, telegraphs or telephones, the state may if it chooses exact from the party or corporation given such exclusive use pecuniary compensation to the general public for being deprived of the common use of the portion thus appropriated." *Id.*, at 98–99, 101–102 (emphasis added).[6]

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[6] The City of New York objects that this case only involved a city's right to charge for use of its streets, and not the power of eminent domain; the city could have excluded the company from any use of its streets. But the physical occupation principle upon which the right to compensation was

Similarly, in *Western Union Telegraph Co.* v. *Penn. R. Co.*, 195 U. S. 540 (1904), a telegraph company constructed and operated telegraph lines over a railroad's right of way. In holding that federal law did not grant the company the right of eminent domain or the right to operate the lines absent the railroad's consent, the Court assumed that the invasion of the telephone lines would be a compensable taking. *Id.*, at 570 (the right of way "cannot be appropriated in whole or in part except upon the payment of compensation"). Later cases, relying on the character of a physical occupation, clearly establish that permanent occupations of land by such installations as telegraph and telephone lines, rails, and underground pipes or wires are takings even if they occupy only relatively insubstantial amounts of space and do not seriously interfere with the landowner's use of the rest of his land. See, *e. g.*, *Lovett* v. *West Va. Central Gas Co.*, —— W.Va. ——, 65 S.E. 196 (1909); *Southwestern Bell Telephone Co.* v. *Webb*, 393 S.W. 2d 117, 121 (Mo. App. 1965). *Cf. Portsmouth Harbor Land & Hotel Co.* v. *United States*, 260 U. S. 327 (1922). See generally 2 J. Sackman, Nichols' Law of Eminent Domain § 6.21 (rev. 3d ed. 1980).[7]

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based has often been cited as authority in eminent domain cases. See, *e. g.*, *Western Union Telegraph Co.* v. *Penn. R. Co.*, 195 U. S. 540, 566–567 (1904); *California* v. *United States*, 395 F. 2d 261, 263, n. 4 (CA9 1968). Also, the Court squarely held that insofar as the company relied on a federal statute authorizing its use of post roads, an appropriation of state property would require compensation. *St. Louis* v. *Western Union Telegraph Co.*, 148 U. S. 92, 101 (1893).

[7] Early commentators viewed a physical occupation of real property as the quintessential deprivation of property. See, *e. g.*, 1 W. Blackstone, Commentaries *139; J. Lewis, A Treatise on the Law of Eminent Domain in the United States 197 (1888) ("Any invasion of property, except in case of necessity . . . , either upon, above or below the surface, and whether temporary or permanent, is a *taking:* as by constructing a ditch through it, passing under it by a tunnel, laying gas, water or sewer pipes in the soil, or extending structures over it, as a bridge or telephone wire." (footnote omitted; emphasis original)); P. Nichols, 1 The Law of Eminent Domain

More recent cases confirm the distinction between a permanent physical occupation, a physical invasion short of an occupation, and a regulation that merely restricts the use of property. In *United States* v. *Causby*, 328 U. S. 256 (1946), the Court ruled that frequent flights immediately above a land owner's property constituted a taking, comparing such overflights to the quintessential form of a taking:

> "If, by reason of the frequency and altitude of the flights, respondents could not use this land for any purpose, their loss would be complete. It would be as complete as if the United States had entered upon the surface of the land and taken exclusive possession of it." *Id.*, at 261 (footnote omitted).

As the Court further explained,

> "We would not doubt that, if the United States erected an elevated railway over respondents' land at the precise altitude where its planes now fly, there would be a partial taking, even though none of the supports of the structure rested on the land. The reason is that there would be an intrusion so immediate and direct as to subtract from the owner's full enjoyment of the property and to limit his exploitation of it." *Id.*, at 264–265.

The Court concluded that the damages to the respondents "were not merely consequential. They were the product of a direct invasion of respondents' domain." *Id.*, at 265–266. See also *Griggs* v. *Allegheny County*, 369 U. S. 84 (1962).

Two war-time takings cases are also instructive. In *United States* v. *Pewee Coal Co.*, 341 U. S. 114 (1951), the Court unanimously held that the Government's seizure and direction of operation of a coal mine to prevent a national strike of coal miners constituted a taking, though members of the Court differed over which losses suffered during the pe-

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282 (2d ed. 1917).

riod of Government control were compensable. The plurality had little difficulty concluding that because there had been an "actual taking of possession and control," the taking was as clear as if the Government held full title and ownership. *Id.*, at 116 (plurality opinion of Justice Black, with whom Justice Frankfurter, Justice Douglas, and Justice Jackson joined; no other Justice challenged this portion of the opinion). In *United States* v. *Central Eureka Mining Co.*, 357 U. S. 155 (1958), by contrast, the Court found no taking where the Government had issued a war-time order requiring nonessential gold mines to cease operations for the purpose of conserving equipment and manpower for use in mines more essential to the war effort. Over dissenting Justice Harlan's complaint that "as a practical matter the Order led to consequences no different from those that would have followed the temporary acquisition of physical possession of these mines by the United States," *id.*, at 181, the Court reasoned that "the Government did not occupy, use, or in any manner take physical possession of the gold mines or the equipment connected with them." *Id.*, at 165–166. The Court concluded that the temporary though severe restriction on *use* of the mines was justified by the exigency of war.[8] *Cf. YMCA* v. *United States*, 395 U. S. 85 (1969) ("Ordinarily, of course, government occupation of private property deprives the private owner of his use of the property, and it is this deprivation for which the Constitution requires compensation." *Id.*, at 92.)

Although this Court's most recent cases have not addressed the precise issue before us, they have emphasized that physical *invasion* cases are special and have not repudiated the rule that any permanent physical *occupation* is a taking. The cases state or imply that a physical invasion is subject to a balancing process, but they do not suggest that a permanent physical occupation would ever be exempt from the Takings Clause.

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[8] Indeed, although dissenting Justice Harlan would treat the restriction as if it were a physical occupation, it is significant that he relies on physical appropriation as the paradigm of a taking. See *United States* v. *Central Eureka Mining Co.*, 357 U. S. 155, 181, 183–184 (1958) (Harlan, J., dissenting).

Penn Central Transportation Co. v. *New York City*, as noted above, contains one of the most complete discussions of the Takings Clause. The Court explained that resolving whether public action works a taking is ordinarily an ad hoc inquiry in which several factors are particularly significant—the economic impact of the regulation, the extent to which it interferes with investment-backed expectations, and the character of the governmental action. 438 U. S., at 124. The opinion does not repudiate the rule that a permanent physical occupation is a government action of such a unique character that it is a taking without regard to other factors that a court might ordinarily examine.[9]

In *Kaiser Aetna* v. *United States*, 444 U. S. 164 (1979), the Court held that the government's imposition of a navigational servitude requiring public access to a pond was a taking where the land owner had reasonably relied on government consent in connecting the pond to navigable water. The Court emphasized that the servitude took the land owner's right to exclude, "one of the most essential sticks in the bundle of rights that are commonly characterized as property." *Id.*, at 176. The Court explained:

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[9] The City of New York and the opinion of the Court of Appeals place great emphasis on *Penn Central's* reference to a physical invasion "by government," 438 U. S., at 124, and argue that a similar invasion by a private party should be treated differently. We disagree. A permanent physical occupation authorized by state law is a taking without regard to whether the State, or instead a party authorized by the State, is the occupant. See, *e. g.*, *Pumpelly*, *supra*. *Penn Central* simply holds that in cases of physical invasion short of permanent appropriation, the fact that the government itself commits an invasion from which it directly benefits is one relevant factor in determining whether a taking has occurred. 438 U. S., at 124, 128.

> "This is not a case in which the Government is exercising its regulatory power in a manner that will cause an insubstantial devaluation of petitioner's private property; rather, the imposition of the navigational servitude in this context will result in an *actual physical invasion* of the privately owned marina. . . . And even if the Government physically invades only an easement in property, it must nonetheless pay compensation. See *United States* v. *Causby*, 328 U. S. 256, 265 (1946); *Portsmouth Co.* v. *United States*, 260 U. S. 327 (1943)." *Id.*, at 180 (emphasis added).

Although the easement of passage, not being a permanent occupation of land, was not considered a taking *per se*, *Kaiser Aetna* reemphasizes that a physical invasion is a government intrusion of an unusually serious character.[10]

Another recent case underscores the constitutional distinction between a permanent occupation and a temporary physical invasion. In *PruneYard Shopping Center* v. *Robins*, 447 U. S. 74 (1980), the Court upheld a state constitutional requirement that shopping center owners permit individuals to exercise free speech and petition rights on their property, to which they had already invited the general public. The Court emphasized that the state constitution does not prevent the owner from restricting expressive activities by imposing reasonable time, place, and manner restrictions to minimize interference with the owner's commercial functions.

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[10] See also *Andrus* v. *Allard*, 444 U. S. 51 (1979). That case held that the prohibition of the sale of eagle feathers was not a taking as applied to traders of bird artifacts. "The regulations challenged here do not compel the surrender of the artifacts, and there is no physical invasion or restraint upon them. . . . In this case, it is crucial that appellees retain the rights to possess and transport their property, and to donate or devise the protected birds. . . . [L]oss of future profits—unaccompanied by any physical property restriction—provides a slender reed upon which to rest a takings claim." *Id.*, at 65–66.

Since the invasion was temporary and limited in nature, and since the owner had not exhibited an interest in excluding all persons from his property, "the fact that [the solicitors] may have 'physically invaded' [the owners'] property cannot be viewed as determinative." *Id.*, at 84.[11]

In short, when the "character of the governmental action," *Penn Central*, 438 U. S., at 124, is a permanent physical occupation of property, our cases uniformly have found a taking to the extent of the occupation, without regard to whether the action achieves an important public benefit or has only minimal economic impact on the owner.

B

The historical rule that a permanent physical occupation of another's property is a taking has more than tradition to commend it. Such an appropriation is perhaps the most serious form of invasion of an owner's property interests. To borrow a metaphor, *cf. Andrus* v. *Allard*, 444 U. S., at 65–66, the government does not simply take a single "strand" from the "bundle" of property rights: it chops through the bundle, taking a slice of every strand.

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[11] Teleprompter's reliance on labor cases requiring companies to permit access to union organizers, see, *e. g.*, *Hudgens* v. *NLRB*, 424 U. S. 507 (1976); *Central Hardware Co.* v. *NLRB*, 407 U. S. 539 (1972); *NLRB* v. *Babcock & Wilcox Co.*, 351 U. S. 105 (1956), is similarly misplaced. As we recently explained:

> "[T]he allowed intrusion on property rights is limited to that necessary to facilitate the exercise of employees' § 7 rights [to organize under the National Labor Relations Act]. After the requisite need for access to the employer's property has been shown, the access is limited to (i) union organizers; (ii) prescribed nonworking areas of the employer's premises; and (iii) the duration of the organization activity. In short, the principle of accommodation announced in *Babcock* is limited to labor organization campaigns, and the 'yielding' of property rights it may require is both temporary and limited." *Central Hardware Co.*, 407 U. S., at 545.

Property rights in a physical thing have been described as the rights "to possess, use and dispose of it." *United States* v. *General Motors Corp.*, 323 U. S. 373, 378 (1945). To the extent that the government permanently occupies physical property, it effectively destroys *each* of these rights. First, the owner has no right to possess the occupied space himself, and also has no power to exclude the occupier from possession and use of the space. The power to exclude has traditionally been considered one of the most treasured strands in an owner's bundle of property rights.[12] See *Kaiser Aetna*, 444 U. S., at 179–180; see also Restatement of Property § 7 (1936). Second, the permanent physical occupation of property forever denies the owner any power to control the use of the property; he not only cannot exclude others, but can make no non-possessory use of the property. Although deprivation of the right to use and obtain a profit from property is not, in every case, independently sufficient to establish a taking, see *Andrus* v. *Allard*, 444 U. S., at 66, it is clearly relevant. Finally, even though the owner may retain the bare legal right to dispose of the occupied space by transfer or sale, the permanent occupation of that space by a stranger will ordinarily empty the right of any value, since the purchaser will also be unable to make any use of the property.

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[12] The permanence and absolute exclusivity of a physical occupation distinguish it from temporary limitations on the right to exclude. Not every physical *invasion* is a taking. As *PruneYard Shopping Center*, *Kaiser Aetna* and the intermittent flooding cases reveal, such temporary limitations are subject to a more complex balancing process to determine whether they are a taking. The rationale is evident: they do not absolutely disposses the owner of his rights to use, and exclude others from, his property.

The dissent objects that the distinction between a permanent physical occupation and a temporary invasion will not always be clear. *Post*, at 7. This objection is overstated, and in any event is irrelevant to the critical point that a permanent physical occupation *is* unquestionably a taking. In the antitrust area, similarly, this Court has not declined to apply a *per se* rule simply because a court must, at the boundary of the rule, apply the rule of reason and engage in a more complex balancing analysis.

Moreover, an owner suffers a special kind of injury when a *stranger* directly invades and occupies the owner's property. As section IIA, *supra*, indicates, property law has long protected an owner's expectation that he will be relatively undisturbed at least in the possession of his property. To require, as well, that the owner permit another to exercise complete dominion literally adds insult to injury. See Michelman, Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law, 80 Harv. L. Rev. 1165, 1228, and n. 110 (1967). Furthermore, such an occupation is qualitatively more severe than a regulation of the *use* of property, even a regulation that imposes affirmative duties on the owner, since the owner may have no control over the timing, extent, or nature of the invasion. See *infra*, at 20–21, n. 19.

The traditional rule also avoids otherwise difficult line-drawing problems. Few would disagree that if the State required landlords to permit third parties to install swimming pools on the landlords' rooftops for the convenience of the tenants, the requirement would be a taking. If the cable installation here occupied as much space, again, few would disagree that the occupation would be a taking. But constitutional protection for the rights of private property cannot be made to depend on the size of the area permanently occupied.[13] Indeed, it is possible that in the future, additional

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[13] In *United States* v. *Causby, supra*, the Court approvingly cited *Butler* v. *Frontier Telephone Co.*, 186 N.Y. 486, 79 N.E. 716 (1906), holding that ejectment would lie where a telephone wire was strung across the plaintiff's property without touching the soil. The Court quoted the following language:

> ". . . an owner is entitled to the absolute and undisturbed possession of every part of his premises, including the space above, as

cable installations that more significantly restrict a landlord's use of the roof of his building will be made. Section 828 requires a landlord to permit such multiple installations.[14]

Finally, whether a permanent physical occupation has occurred presents relatively few problems of proof. The placement of a fixed structure on land or real property is an obvious fact that will rarely be subject to dispute. Once the fact of occupation is shown, of course, a court should consider the *extent* of the occupation as one relevant factor in determining the compensation due.[15] For that reason, moreover, there is

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> much as a mine beneath. If the wire had been a huge cable, several inches thick and but a foot above the ground, there would have been a difference in degree, but not in principle. Expand the wire into a beam supported by posts standing upon abutting lots without touching the surface of plaintiff's land, and the difference would still be one of degree only. Enlarge the beam into a bridge, and yet space only would be occupied. Erect a house upon the bridge, and the air above the surface of the land would alone be disturbed." *United States* v. *Causby*, 328 U. S., at 265 n. 10, quoting *Butler* v. *Frontier Tel. Co.*, 186 N.Y., at 491–492, 79 N.E., at ——.

[14] Although the City of New York has granted an exclusive franchise to Teleprompter, it is not required to do so under state law, see N.Y. Exec. Law, § 811 *et seq.* (McKinney), and future changes in technology may cause the City to reconsider its decision. Indeed, at present some communities apparently grant nonexclusive franchises. Brief for National Satellite Cable Ass'n et al as *Amici Curiae* 21.

[15] In this case, the Court of Appeals noted testimony preceding the enactment of § 828 that the landlord's interest in excluding cable installation "consists entirely of insisting that some negligible unoccupied space remain unoccupied." *Loretto*, 53 N.Y. 2d, at 141 (emphasis omitted). The State Cable Commission referred to the same testimony in establishing a $1 presumptive award. Statement of General Policy (Jan. 15, 1976), App. 48.

A number of the dissent's arguments—that § 828 "likely increases both the building's resale value and its attractiveness on the rental market," *post*, at 11, and that appellant might have no alternative use for the cable-occupied space, *id.*, at 13—may also be relevant to the amount of compensation due. It should be noted, however, that the first argument is speculative and is contradicted by appellant's testimony that she and "the less need to consider the extent of the occupation in determining whether there is a taking in the first instance.

C

Teleprompter's cable installation on appellant's building constitutes a taking under the traditional test. The installation involved a direct physical attachment of plates, boxes, wires, bolts and screws to the building, completely occupying space immediately above and upon the roof and along the building's exterior wall.[16]

In light of our analysis, we find no constitutional difference between a crossover and a noncrossover installation. The portions of the installation necessary for both crossovers and noncrossovers permanently appropriate appellant's property. Accordingly, each type of installation is a taking.

Appellees raise a series of objections to application of the traditional rule here. Teleprompter notes that the law applies only to buildings used as rental property, and draws the conclusion that the law is simply a permissible regulation of the use of real property. We fail to see, however, why a

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whole block" would be able to sell their buildings for a higher price absent the installation. App. 100.

[16] It is constitutionally irrelevant whether appellant (or her predecessor in title) had previously occupied this space, since a "landowner owns at least as much of the space above the ground as he can occupy or use in connection with the land." *United States* v. *Causby*, 328 U. S., at 264.

The dissent asserts that a taking of about one-eighth of a cubic foot of space is not of constitutional significance. *Post*, at 2. The assertion appears to be factually incorrect, since it ignores the two large silver boxes that appellant identified as part of the installation. App. 90; Loretto Aff. in Support of Motion for Summ. Judgment (4/21/78), Rec. 77. Although the record does not reveal their size, appellant states that they are approximately 18" x 12" x 6", Brief for Appellant 6*, and appellees do not dispute this statement. The displaced volume, then, is in excess of 1 1/2 cubic feet. In any event, these facts are not critical: whether the installation is a taking does not depend on whether the volume of space it occupies is bigger than a bread box.

physical occupation of one type of property but not another type is any less a physical occupation. Insofar as Teleprompter means to suggest that this is not a permanent physical invasion, we must differ. So long as the property remains residential and a CATV company wishes to retain the installation, the landlord must permit it.[17]

Teleprompter also asserts the related argument that the State has effectively granted a tenant the property right to have a CATV installation placed on the roof of his building, as an appurtenance to the tenant's leasehold. The short answer is that § 828(1)(a) does not purport to give the *tenant* any enforceable property rights with respect to CATV installation, and the lower courts did not rest their decisions on this ground.[18] Of course, Teleprompter, not appellant's tenants, actually owns the installation. Moreover, the government does not have unlimited power to redefine property rights. See *Webb's Fabulous Pharmacies, Inc.* v. *Beckwith*, 449 U. S. 155, 164 (1980) ("a State, by *ipse dixit*, may not transform private property into public property without compensation").

Finally, we do not agree with appellees that application of the physical occupation rule will have dire consequences for the government's power to adjust landlord-tenant relationships. This Court has consistently affirmed that States have broad power to regulate housing conditions in general and the landlord-tenant relationship in particular without paying compensation for all economic injuries that such regulation entails. See, *e. g.*, *Heart of Atlanta Motel, Inc.* v. *United States*, 379 U. S. 241 (1964) (discrimination in places of public accommodation); *Queenside Hills Co.* v. *Saxl*, 328 U. S. 80 (1946) (fire regulation); *Bowles* v. *Willingham*, 321 U. S. 503 (1944) (rent control); *Home Building & Loan Ass'n* v. *Blaisdell*, 290 U. S. 398 (1934) (mortgage moratorium); *Edgar A. Levy Leasing Co.* v. *Siegel*, 258 U. S. 242 (1922) (emergency housing law); *Block* v. *Hirsh*, 256 U. S. 135 (1921) (rent control). In none of these cases, however, did the government authorize the permanent occupation of the landlord's property by a third party. Consequently, our holding today in no way alters the analysis governing the State's power to require landlords to comply with building codes and provide utility connections, mailboxes, smoke detectors, fire extinguishers, and the like in the common area of a building. So long as these regulations do not require the landlord to suffer the physical occupation of a portion of his building by a third party, they will be analyzed under the multi-factor inquiry generally applicable to non-possessory governmental activity. See *Penn Central*, *supra*.[19]

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[17] It is true that the landlord could avoid the requirements of § 828 by ceasing to rent the building to tenants. But a landlord's ability to rent his property may not be conditioned on his forfeiting the right to compensation for a physical occupation. Teleprompter's broad "use-dependency" argument proves too much. For example, it would allow the government to require a landlord to devote a substantial portion of his building to vending and washing machines, with all profits to be retained by the owners of these services and with no compensation for the deprivation of space. It would even allow the government to requisition a certain number of apartments as permanent government offices. The right of a property owner to exclude a stranger's physical occupation of his land cannot be so easily manipulated.

[18] We also decline to hazard an opinion as to the respective rights of the landlord and tenant under state law *prior* to enactment of § 828 to use the space occupied by the cable installation, an issue over which the parties sharply disagree.

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[19] If § 828 required landlords to provide cable installation if a tenant so desires, the statute might present a different question from the question before us, since the landlord would own the installation. Ownership would give the landlord rights to the placement, manner, use, and possibly the disposition of the installation. The fact of ownership is, contrary to the dissent, not simply "incidental," *post*, at 9; it would give a landlord (rather than a CATV company) full authority over the installation except only as government specifically limited that authority. The *landlord* would decide how to comply with applicable government regulations concerning CATV and therefore could minimize the physical, aesthetic, and other effects of the installation. Moreover, if the landlord wished to repair, demolish, or construct in the area of the building where the installation is lo-

III

Our holding today is very narrow. We affirm the traditional rule that a permanent physical occupation of property is a taking. In such a case, the property owner entertains an historically-rooted expectation of compensation, and the character of the invasion is qualitatively more intrusive than perhaps any other category of property regulation. We do not, however, question the equally substantial authority upholding a State's broad power to impose appropriate restrictions upon an owner's *use* of his property.

Furthermore, our conclusion that § 828 works a taking of a portion of appellant's property does not presuppose that the fee which many landlords had obtained from Teleprompter prior to the law's enactment is a proper measure of the value of the property taken. The issue of the amount of compensation that is due, on which we express no opinion, is a matter for the state courts to consider on remand.[20]

The judgment of the New York Court of Appeals is reversed and the case is remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

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cated, he need not incur the burden of obtaining the CATV company's cooperation in moving the cable.

In this case, by contrast, appellant suffered injury that might have been obviated if she had owned the cable and could exercise control over its installation. The drilling and stapling that accompanied installation apparently caused physical damage to appellant's building. App. 83, 95–96, 104. Appellant, who resides in her building, further testified that the cable installation is "ugly." App. 99. Although § 828 provides that a landlord may require "reasonable" conditions that are "necessary" to protect the appearance of the premises and may seek indemnity for damage, these provisions are somewhat limited. Even if the provisions are effective, the inconvenience to the landlord of initiating the repairs remains a cognizable burden.

[20] In light of our disposition of appellant's takings claim, we do not address her contention that § 828 deprives her of property without due process of law.

SUPREME COURT OF THE UNITED STATES

No. 81-244

JEAN LORETTO, ON BEHALF OF HERSELF AND ALL OTHERS SIMILARLY SITUATED, APPELLANT *v.* TELEPROMPTER MANHATTAN CATV CORP., ET AL.

ON APPEAL FROM THE COURT OF APPEALS OF NEW YORK

[June 30, 1982]

JUSTICE BLACKMUN, with whom JUSTICE BRENNAN and JUSTICE WHITE join, dissenting.

If the Court's decisions construing the Takings Clause state anything clearly, it is that "[t]here is no set formula to determine where regulation ends and taking begins." *Goldblatt* v. *Town of Hempstead*, 369 U. S. 590, 594 (1962).[1]

In a curiously anachronistic decision, the Court today acknowledges its historical disavowal of set formulae in almost the same breath as it constructs a rigid *per se* takings rule: "a permanent physical occupation authorized by government is a taking without regard to the public interests that it may serve." *Ante*, at 6. To sustain its rule against our recent precedents, the Court erects a strained and untenable distinction between "temporary physical invasions," whose constitutionality concededly "is subject to a balancing process," and "permanent physical occupations," which are "taking[s] without regard to other factors that a court might ordinarily examine." *Ante*, at 13.

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[1] See *Kaiser Aetna* v. *United States*, 444 U. S. 164, 175 (1979); *Andrus* v. *Allard*, 444 U. S. 51, 65 (1979) ("There is no abstract or fixed point at which judicial intervention under the Takings Clause becomes appropriate."); *Penn Central Transportation Co.* v. *New York City*, 438 U. S. 104, 124 (1978); *United States* v. *Caltex, Inc.*, 344 U. S. 149, 156 (1952) ("No rigid rules can be laid down to distinguish compensable losses from noncompensable losses."); *Pennsylvania Coal Co.* v. *Mahon*, 260 U. S. 393, 416 (1922) (a takings question "is a question of degree—and therefore cannot be disposed of by general propositions").

In my view, the Court's approach "reduces the constitutional issue to a formalistic quibble" over whether property has been "permanently occupied" or "temporarily invaded." Sax, Takings and the Police Power, 74 Yale L.J. 36, 37 (1964). The Court's application of its formula to the facts of this case vividly illustrates that its approach is potentially dangerous as well as misguided. Despite its concession that "States have broad power to regulate . . . the landlord-tenant relationship . . . without paying compensation for all economic injuries that such regulation entails," *ante*, at 21, the Court uses its rule to undercut a carefully-considered legislative judgment concerning landlord-tenant relationships. I therefore respectfully dissent.

I

Before examining the Court's new takings rule, it is worth reviewing what was "taken" in this case. At issue are about 36 feet of cable one-half inch in diameter and two 4" x 4" x 4" metal boxes. Jointly, the cable and boxes occupy only about one-eighth of a cubic foot of space on the roof of appellant's Manhattan apartment building. When appellant purchased that building in 1971, the "physical invasion" she now challenges had already occurred.[2] Appellant did not bring this action until about five years later, demanding 5% of appellee Teleprompter's gross revenues from her building, and claiming that the operation of N.Y. Exec. Law § 828 (McKinney Supp. 1982) "took" her property. The New York Supreme Court, the Appellate Division, and the New York Court of Appeals all rejected that claim, upholding § 828 as a valid exercise of the State's police power.

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[2] In January 1968, appellee Teleprompter signed a five-year installation agreement with the building's previous owner in exchange for a flat fee of $50. Appellee installed both the 30-foot main cable and its four- to six-foot "crossover" extension in June 1970. For two years after taking possession of the building and the appurtenant equipment, appellant did not object to the cable's presence. Indeed, despite numerous inspections, appellant had never even noticed the equipment until Teleprompter first began to provide cable television service to one of her tenants. 53 N.Y. 2d 124, 134-135, 423 N.E. 2d 320, 324 (1981). Nor did appellant thereafter ever specifically ask Teleprompter to remove the components from her building.

The Court of Appeals held that

> "the State may proscribe a trespass action by landlords generally against a cable TV company which places a cable and other fixtures on the roof of any landlord's building, in order to protect the right of the tenants of rental property, who will ultimately have to pay any charge a landlord is permitted to collect from the cable TV company, to obtain TV service in their respective apartments." 53 N.Y. 2d 124, 153, 423 N.E. 2d 320, 335 (1981).

In so ruling, the court applied the multifactor balancing test prescribed by this Court's recent Takings Clause decisions. Those decisions teach that takings questions should be resolved through "essentially ad hoc, factual inquiries," *Kaiser Aetna* v. *United States*, 444 U. S. 164, 175 (1979), into "such factors as the character of the governmental action, its economic impact, and its interference with reasonable investment-backed expectations." *PruneYard Shopping Center* v. *Robins*, 447 U. S. 74, 83 (1980). See 53 N.Y. 2d, at 144–151, 423 N.E. 2d., at 330–334.

The Court of Appeals found, first, that § 828 represented a reasoned legislative effort to arbitrate between the interests

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App. 107, 108, 110.

Although the Court alludes to the presence of "two large silver boxes" on appellant's roof, *ante*, at 19, n. 16, the New York Court of Appeals' opinion nowhere mentions them, nor are their dimensions stated anywhere in the record.

of tenants and landlords and to encourage development of an important educational and communications medium.[3] *Id.*, at 143–145, 423 N.E. 2d, at 329–330. Moreover, under *PruneYard Shopping Center* v. *Robins*, 447 U. S., at 83–84, the fact that § 828 authorized Teleprompter to make a minor physical intrusion upon appellant's property was in no way determinative of the takings question. 53 N.Y. 2d, at 146–147, 423 N.E. 2d, at 331.[4]

Second, the court concluded that the statute's economic impact on appellant was *de minimis* because § 828 did not affect the fair return on her property. 53 N.Y. 2d, at 148–150, 423 N.E. 2d, at 332–333. Third, the statute did not interfere with appellant's reasonable investment-backed expectations. *Id.*, at 150–151, 423 N.E. 2d, at 333–334. When appellant purchased the building, she was unaware of the existence of the cable. See n. 2, *supra*. Thus, she could not have invested in the building with any reasonable expectation that the one-eighth cubic foot of space occupied by the cable television installment would become income-productive. 53 N.Y. 2d, at 155, 423 N.E. 2d, at 336.

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[3] The court found that the state legislature had enacted § 828 to "prohibit gouging and arbitrary action" by "landlords [who] in many instances have imposed extremely onerous fees and conditions on cable access to their buildings." 53 N.Y. 2d, at 141, 423 N.E. 2d, at 328, citing testimony of Joseph C. Swidler, Chairman of the Public Service Commission, before the Joint Legislative Committee considering the CATV bill.

Given the growing importance of cable television, the legislature decided that urban tenants' need for access to that medium justified a minor intrusion upon the landlord's interest, which

> "consists entirely of insisting that some negligible unoccupied space remain unoccupied. The tenant's interest clearly is more substantial, consisting of a right to receive (and perhaps send) communications from and to the outside world. In the electronic age, the landlord should not be able to preclude a tenant from obtaining CATV service (or to exact a surcharge for allowing the service) any more than he could preclude a tenant from receiving mail or telegrams directed to him." *Ibid.*, citing Regulation of Cable Television by the State of New York, Report to the New York Public Service Commission by Commissioner William K. Jones 207 (1970).

[4] Section 828 carefully regulates the cable television company's physical intrusion onto the landlord's property. If the landlord requests, the company must conform its installations "to such reasonable conditions as are necessary to protect the safety, functioning, and appearance of the premises, and the convenience and well-being of other tenants." N.Y. Exec. Law § 828.1.a.i (McKinney Supp. 1982). Furthermore, the company must "agree to indemnify the landlord for any damage caused by the installation, operation or removal of such facilities." § 828.1.a.iii. Finally, the statute authorizes the landlord to require either "the cable television company or the tenant or a combination thereof [to] bear the entire cost of the installation, operation or removal" of any equipment. § 828.1.a.ii.

II

Given that the New York Court of Appeals' straightforward application of this Court's balancing test yielded a finding of no taking, it becomes clear why the Court now constructs a *per se* rule to reverse. The Court can escape the result dictated by our recent takings cases only by resorting to bygone precedents and arguing that "permanent physical occupations" somehow differ qualitatively from all other forms of government regulation.

The Court argues that a *per se* rule based on "permanent physical occupation" is both historically-rooted, see *ante*, at 6–15, and jurisprudentially sound, see *ante*, at 15–19. I disagree in both respects. The 19th century precedents relied on by the Court lack any vitality outside the agrarian context in which they were decided.[5] But if, by chance, they have

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[5] The Court properly acknowledges that none of our recent takings decisions have adopted a *per se* test for either temporary physical invasions or permanent physical occupations. See *ante*, at 12–15 and 16, n. 12. While the Court relies on historical dicta to support its *per se* rule, the only holdings it cites fall into two categories: a number of cases involving flooding, *ante*, at 7–8, and *St. Louis* v. *Western Union Telegraph Co.*, 148 U. S. 92 (1893), cited *ante*, at 9.

In 1950, the Court noted that the first line of cases stands for "the principle that the destruction of privately owned land by flooding is 'a taking' to the extent of the destruction caused," and that those rulings had already "been limited by later decisions in some respects." *United States* v. *Kan-*

any lingering vitality, then, in my view, those cases stand for a constitutional rule that is uniquely unsuited to the modern urban age. Furthermore, I find logically untenable the Court's assertion that § 828 must be analyzed under a *per se* rule because it "effectively destroys" three of "the most treasured strands in an owner's bundle of property rights," *ante*, at 16.

A

The Court's recent Takings Clause decisions teach that *nonphysical* government intrusions on private property, such as zoning ordinances and other land-use restrictions, have become the rule rather than the exception. Modern government regulation exudes intangible "externalities" that may diminish the value of private property far more than minor physical touchings. Nevertheless, as the Court recognizes, it has "often upheld substantial regulation of an owner's use of his own property where deemed necessary to promote the public interest." *Ante*, at 6. See, *e. g.*, *Agins* v. *City of Tiburon*, 447 U. S. 255 (1980); *Penn Central Transportation Co.* v. *New York City*, 438 U. S. 104, 124–125 (1978); *Village of Euclid* v. *Ambler Realty Co.*, 272 U. S. 365 (1926).

Precisely because the extent to which the government may injure private interests now depends so little on whether or not it has authorized a "physical contact," the Court has

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sas City Life Ins. Co., 339 U. S. 799, 809–810. Even at the time of its decision, *St. Louis* v. *Western Union Telegraph Co.* addressed only the question "[w]hether the city has power to collect rental for the use of streets and public places" when a private company seeks exclusive use of land whose "use is common to all members of the public, and . . . [is] open equally to citizens of other States with those of the State in which the street is situate." 148 U. S., at 98–99. On its face, that issue is distinct from the question here: whether appellant may extract from Teleprompter a fee for the continuing use of her roof space above and beyond the fee set by statute, namely, "any amount which the commission shall, by regulation, determine to be reasonable." N.Y. Exec. Law § 828.1.b.

avoided *per se* takings rules resting on outmoded distinctions between physical and nonphysical intrusions. As one commentator has observed, a takings rule based on such a distinction is inherently suspect because "its capacity to distinguish, even crudely, between significant and insignificant losses is too puny to be taken seriously." Michelman, Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law, 80 Harv. L. Rev. 1165, 1227 (1967).

Surprisingly, the Court draws an even finer distinction today—between "temporary physical invasions" and "permanent physical occupations." When the government authorizes the latter type of intrusion, the Court would find "a taking without regard to the public interests" the regulation may serve. *Ante*, at 6. Yet an examination of each of the three words in the Court's "permanent physical occupation" formula illustrates that the newly-created distinction is even less substantial than the distinction between physical and nonphysical intrusions that the Court already has rejected.

First, what does the Court mean by "permanent"? Since all "temporary limitations on the right to exclude" remain "subject to a more complex balancing process to determine whether they are a taking," *ante*, at 16, n. 12, the Court presumably describes a government intrusion that lasts forever. But as the Court itself concedes, § 828 does not require appellant to permit the cable installation forever, but only "[s]o long as the property remains residential and a CATV company wishes to retain the installation." *Ante*, at 20. This is far from "permanent."

The Court reaffirms that "States have broad power to regulate housing conditions in general and the landlord-tenant relationship in particular without paying compensation for all economic injuries that such regulation entails." *Ante*, at 21. Thus, § 828 merely defines one of the many statutory responsibilities that a New Yorker accepts when she enters the rental business. If appellant occupies her own building, or converts it into a commercial property, she becomes perfectly free to exclude Teleprompter from her one-eighth cubic foot of roof space. But once appellant chooses to use her property for rental purposes, she must comply with all reasonable government statutes regulating the landlord-tenant relationship.[6] If § 828 authorizes a "permanent" occupation, and thus works a taking "without regard to the public interests that it may serve," then all other New York statutes that require a landlord to make physical attachments to his rental property also must constitute takings, even if they serve indisputably valid public interests in tenant protection and safety.[7]

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[6] In my view, the fact that § 828 incidentally protects so-called "crossover" wires that do not currently serve tenants, see *ante*, at 2, n. 2, does not affect § 828's fundamental character as a piece of landlord-tenant legislation. As the Court recognizes, *ante*, at 2, crossovers are crucial links in the cable "highway," and represent the simplest and most economical way to provide service to tenants in a group of buildings in close proximity. Like the Court, I find "no constitutional difference between a crossover and a noncrossover installation," *ante*, at 19. Even assuming *arguendo* that the crossover extension in this case works a taking, I would be prepared to hold that the incremental governmental intrusion caused by that four- to six-foot wire, which occupies the cubic volume of a child's building block, is a *de minimis* deprivation entitled to no compensation.

[7] See, *e. g.*, N.Y. Mult. Dwell. Law § 35 (McKinney 1974) (requiring entrance doors and lights); § 36 (windows and skylights for public halls and stairs); § 50-a (Supp. 1982) (locks and intercommunication systems); § 50-c (lobby attendants); § 51-a (peepholes); § 51-b (elevator mirrors); § 53 (fire escapes); § 57 (bells and mail receptacles); § 67.3 (fire sprinklers). See also *Queenside Hills Realty Co.* v. *Saxl*, 328 U. S. 80 (1946) (upholding constitutionality of New York fire sprinkler provision).

These statutes specify in far greater detail than § 828 what types of physical facilities a New York landlord must provide his tenants and where he must provide them. See, *e. g.*, N.Y. Mult. Dwell. Law § 75 (owners of multiple dwellings must provide "proper appliances to receive and distribute an adequate supply of water," including "a proper sink with running water and with a two-inch waste and trap"); § 35 (owners of multiple dwellings with frontage exceeding 22 feet must provide "at least two lights, one at each side of the entrance way, with an aggregate illumination of one

The Court denies that its theory invalidates these statutes, because they "do not require the landlord to suffer the physical occupation of a portion of his building by a third party." *Ante*, at 21. But surely this factor cannot be determinative, since the Court simultaneously recognizes that temporary invasions by third parties are not subject to a *per se* rule. Nor can the qualitative difference arise from the incidental fact that, under § 828, Teleprompter, rather than appellant or her tenants, owns the cable installation. Cf. *ante*, at 20–21 and n. 19. If anything, § 828 leaves appellant better off than do other housing statutes, since it ensures that her property will not be damaged aesthetically or physically, see n. 4, *supra*, without burdening her with the cost of buying or maintaining the cable.

In any event, under the Court's test, the "third party" problem would remain even if appellant herself owned the cable. So long as Teleprompter continuously passed its electronic signal through the cable, a litigant could argue that the second element of the Court's formula—a "physical touching" by a stranger—was satisfied and that § 828 therefore worked a taking.[8] Literally read, the Court's test opens the door to endless metaphysical struggles over whether or not an indi-

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hundred fifty watts or equivalent illumination"); § 50–a.2 (Supp. 1982) (owners of Class A multiple dwellings must provide intercommunication system "located at an automatic self-locking door giving public access to the main entrance hall or lobby").

Apartment building rooftops are not exempted. See § 62 (landlords must place parapet walls and guardrails on their roofs "three feet six inches or more in height above the level of such area").

[8] Indeed, appellant's counsel made precisely this claim at oral argument. Urging the rule which the Court now adopts, appellant's counsel suggested that a taking would result even if appellant owned the cable. "[T]he precise location of the easement [taken by Teleprompter changes] from the surface of the roof to inside the wire . . . [T]he wire itself is owned by the landlord, but the cable company has the right to pass its signal through the wire without compensation to the landlord, for its commercial benefit." Tr. of Oral Arg. 15.

vidual's property has been "physically" touched. It was precisely to avoid "permit[ting] technicalities of form to dictate consequences of substance," *United States* v. *Central Eureka Mining Co.*, 357 U. S. 155, 181 (1958) (Harlan, J., dissenting), that the Court abandoned a "physical contacts" test in the first place.

Third, the Court's talismanic distinction between a continuous "occupation" and a transient "invasion" finds no basis in either economic logic or Takings Clause precedent. In the landlord-tenant context, the Court has upheld against takings challenges rent control statutes permitting "temporary" physical invasions of considerable economic magnitude. See, *e. g.*, *Block* v. *Hirsh*, 256 U. S. 135 (1921) (statute permitting tenants to remain in physical possession of their apartments for two years after the termination of their leases). Moreover, precedents record numerous other "temporary" officially-authorized invasions by third parties that have intruded into an owner's enjoyment of property far more deeply than did Teleprompter's long-unnoticed cable. See, *e. g.*, *PruneYard Shopping Center* v. *Robins*, *supra* (leafletting and demonstrating in busy shopping center); *Kaiser Aetna* v. *United States*, *supra* (public easement of passage to private pond); *United States* v. *Causby*, 328 U. S. 256 (1946) (noisy airplane flights over private land). While, under the Court's balancing test, some of these "temporary invasions" have been found to be takings, the Court has subjected none of them to the inflexible *per se* rule now adapted to analyze the far less obtrusive "occupation" at issue in the present case. Cf. *ante*, at 11, 13–15.

In sum, history teaches that takings claims are properly evaluated under a multifactor balancing test. By directing that all "permanent physical occupations" automatically are compensable, "without regard to whether the action achieves an important public benefit or has only minimal economic impact on the owner," *ante*, at 15, the Court does not further equity so much as it encourages litigants to manipulate their factual allegations to gain the benefit of its *per se* rule. Cf. n. 8, *supra.* I do not relish the prospect of distinguishing the inevitable flow of certiorari petitions attempting to shoehorn insubstantial takings claims into today's "set formula."

B

Setting aside history, the Court also states that the permanent physical occupation authorized by § 828 is a *per se* taking because it uniquely impairs appellant's powers to dispose of, use, and exclude others from, her property. See *ante,* at 15–19. In fact, the Court's discussion nowhere demonstrates how § 828 impairs these private rights in a manner *qualitatively* different from other garden-variety landlord-tenant legislation.

The Court first contends that the statute impairs appellant's legal right to dispose of cable-occupied space by transfer and sale. But that claim dissolves after a moment's reflection. If someone buys appellant's apartment building, but does not use it for rental purposes, that person can have the cable removed, and use the space as he wishes. In such a case, appellant's right to dispose of the space is worth just as much as if § 828 did not exist.

Even if another landlord buys appellant's building for rental purposes, § 828 does not render the cable-occupied space valueless. As a practical matter, the regulation ensures that tenants living in the building will have access to cable television for as long as that building is used for rental purposes, and thereby likely increases both the building's resale value and its attractiveness on the rental market.[9]

In any event, § 828 differs little from the numerous other New York statutory provisions that require landlords to install physical facilities "permanently occupying" common spaces in or on their buildings. As the Court acknowledges, the States traditionally—and constitutionally—have exercised their police power "to require landlords to . . . provide utility connections, mailboxes, smoke detectors, fire extinguishers, and the like in the common area of a building." *Ante*, at 21. Like § 828, these provisions merely ensure tenants access to services the legislature deems important, such as water, electricity, natural light, telephones, intercommunication systems, and mail service. See n. 7, *supra*. A landlord's dispositional rights are affected no more adversely when he sells a building to another landlord subject to § 828, than when he sells that building subject only to these other New York statutory provisions.

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[9] In her pretrial deposition, appellant conceded not only that owners of other apartment buildings thought that the cable's presence had enhanced the market value of their buildings, App. 102–103, but also that her own tenants would have been upset if the cable connection had been removed. *Id.*, at 107, 108, 110.

The Court also suggests that § 828 unconstitutionally alters appellant's right to control the *use* of her one-eighth cubic foot of roof space. But other New York multiple dwelling statutes not only oblige landlords to surrender significantly larger portions of common space for their tenants' use, but also compel the *landlord*—rather than the tenants or the private installers—to pay for and to maintain the equipment. For example, New York landlords are required by law to provide and pay for mailboxes that occupy more than five times the volume that Teleprompter's cable occupies on appellant's building. See Tr. of Oral Arg. 42–43, citing N.Y. Mult. Dwell. Law § 57 (McKinney 1974). If the State constitutionally can insist that appellant make this sacrifice so that her tenants may receive mail, it is hard to understand why the State may not require her to surrender less space, *filled at another's expense*, so that those same tenants can receive television signals.

For constitutional purposes, the relevant question cannot be solely *whether* the State has interfered in some minimal way with an owner's use of space on her building. Any intelligible takings inquiry must also ask whether the *extent* of the

State's interference is so severe as to constitute a compensable taking in light of the owner's alternative uses for the property.[10] Appellant freely admitted that she would have had no other use for the cable-occupied space, were Teleprompter's equipment not on her building. See App. 97 (Deposition of Jean A. Loretto).

The Court's third and final argument is that § 828 has deprived appellant of her "power to exclude the occupier from possession and use of the space" occupied by the cable. *Ante*, at 16. This argument has two flaws. First, it unjustifiably assumes that appellant's tenants have no countervailing property interest in permitting Teleprompter to use that space.[11] Second, it suggests that the New York Legislature may not exercise its police power to affect appellant's common-law right to exclude Teleprompter even from one-eighth cubic foot of roof space. But this Court long ago recognized that new social circumstances can justify legislative modification of a property owner's common-law rights, without compensation, if the legislative action serves sufficiently important public interests. See *Munn* v. *Illinois*, 94 U. S. 113, 134 (1876) ("A person has no property, no vested interest, in any rule of the common law. . . . Indeed, the great office of statutes is to remedy defects in the common law as they are developed, and to adapt it to the changes of time and circumstance."); *United States* v. *Causby*, 328 U. S., at 260–261 (In the modern world, "[c]ommon sense revolts at the idea" that legislatures cannot alter common law ownership rights.).

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[10] For this reason, the Court provides no support for its *per se* rule by asserting that the State could not require landlords, without compensation, "to permit third parties to install swimming pools," *ante*, at 17, or vending and washing machines, *ante*, at 20, n. 17, for the convenience of tenants. Presumably, these more intrusive government regulations would create difficult takings problems even under our traditional balancing approach. Depending on the character of the governmental action, its economic impact, and the degree to which it interfered with an owner's reasonable investment-backed expections, among other things, the Court's hypothetical examples might or might not constitute takings. These examples hardly prove, however, that a permanent physical occupation that works a *de minimis* interference with a private property interest is a taking *per se*.

[11] It is far from clear that, under New York law, appellant's tenants would lack all property interests in the few square inches on the exterior of the building to which Teleprompter's cable and hardware attach. Under modern landlord-tenant law, a residential tenancy is not merely a possessory interest in specified space, but also a contract for the provision of a package of services and facilities necessary and appurtenant to that space. See R. Schoshinski, American Law of Landlord and Tenant § 3:14 (1980). A modern urban tenant's leasehold often includes not only contractual, but also statutory, rights, including the rights to an implied warranty of habitability, rent control, and such services as the landlord is obliged by statute to provide. Cf. n. 7, *supra*.

As the Court of Appeals recognized, § 828 merely deprives appellant of a common-law trespass action against Teleprompter, but only for as long as she uses her building for rental purposes, and as long as Teleprompter maintains its equipment in compliance with the statute. JUSTICE MARSHALL recently and most aptly observed:

> "[Appellant's] claim in this case amounts to no less than a suggestion that the common law of trespass is not subject to revision by the State . . . . If accepted, that claim would represent a return to the era of *Lochner* v. *New York*, 198 U. S. 45 (1905), when common-law rights were also found immune from revision by State or Federal Government. Such an approach would freeze the common law as it has been constructed by the courts, perhaps at its 19th-century state of development. It would allow no room for change in response to changes in circumstance. The Due Process Clause does not require such a result." *PruneYard Shopping Center* v. *Robins*, 447 U. S., at 93 (concurring opinion).

III

In the end, what troubles me most about today's decision is that it represents an archaic judicial response to a modern social problem. Cable television is a new and growing, but somewhat controversial, communications medium. See Brief for New York State Cable Television Association as *Amicus Curiae* 6–7 (about 25% of American homes with televisions—approximately 20 million families—currently subscribe to cable television, with the penetration rate expected to double by 1990). The New York Legislature not only recognized, but responded to, this technological advance by enacting a statute that sought carefully to balance the interests of all private parties. See nn. 3 and 4, *supra*. New York's courts in this litigation, with only one jurist in dissent, unanimously upheld the constitutionality of that considered legislative judgment.

This Court now reaches back in time for a *per se* rule that disrupts that legislative determination.[12] Like Justice Black, I believe that "the solution of the problems precipitated by . . . technological advances and new ways of living cannot come about through the application of rigid constitutional restraints formulated and enforced by the courts." *United States* v. *Causby*, 328 U. S., at 274 (dissenting opinion). I would affirm the judgment and uphold the reasoning of the New York Court of Appeals.

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[12] Happily, the Court leaves open the question whether § 828 provides landlords like appellant sufficient compensation for their actual losses. See *ante*, at 22. Since the state cable television commission's regulations permit higher than nominal awards if a landlord makes "a special showing of greater damages," App. 52, the concurring opinion in the New York Court of Appeals found that the statute awards just compensation. See 53 N.Y. 2d, at 155, 423 N.E. 2d, at 336 ("[I]t is obvious that a landlord who actually incurs damage to his property or is restricted in the use to which he might put that property will receive compensation commensurate with the greater injury."). If, after the remand following today's decision, this minor physical invasion is declared to be a taking deserving little or no compensation, the net result will have been a large expenditure of judicial resources on a constitutional claim of little moment.

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(Slip Opinion)

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SUPREME COURT OF THE UNITED STATES

Syllabus

GENERAL BUILDING CONTRACTORS ASSOCIATION, INC. v. PENNSYLVANIA ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 81–280. Argued March 3, 1982—Decided June 29, 1982 *

Respondents—the Commonwealth of Pennsylvania and several black individuals representing a class of racial minorities who are skilled or seek work as operating engineers in the construction industry in Eastern Pennsylvania and Delaware—brought an action in Federal District Court under 42 U. S. C. § 1981, seeking to redress alleged racial discrimination in the operation of an exclusive hiring hall established in collective-bargaining contracts between the local union representing operating engineers and petitioner trade associations and construction industry employers. Respondents also alleged discrimination in the operation of an apprenticeship program established by the union and the trade associations and administered by the Joint Apprenticeship and Training Committee (JATC), half of whose members are appointed by the union and half by the trade associations. Named as defendants were the union and petitioners. The District Court found that although the hiring hall system was neutral on its face, the union in administering the system practiced a pattern of intentional discrimination, and the court also found similar discrimination in the JATC's administration of the apprenticeship program. On the basis of these findings, the court held that the union and the JATC had violated § 1981, and that, although petitioners as a class did not intentionally discriminate against minority workers and were not aware of the union's discriminatory practices, they

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*Together with No. 81–330, *United Engineers & Constructors, Inc.* v. *Pennsylvania et al.*; No. 81–331, *Contractors Association of Eastern Pennsylvania et al.* v. *Pennsylvania et al.*; No. 81–332, *Glasgow, Inc.* v. *Pennsylvania et al.*; and No. 81–333, *Bechtel Power Corp.* v. *Pennsylvania et al.*, also on certiorari to the same court.

Ju 6.8/b:

were nevertheless liable under § 1981 for the purpose of imposing an injunctive remedy. The court reasoned that liability under § 1981 requires no proof of purposeful conduct on any of the defendants' part, but it was sufficient that the employers delegated the hiring procedure to the union and that the union, in effectuating this delegation, intentionally discriminated or, alternatively, produced a discriminatory impact. The court concluded that respondents had shown the requisite relationship among the employers, trade associations, and union to render applicable the theory of *respondeat superior*, thus making petitioners liable for the union's discriminatory acts. The Court of Appeals affirmed.

Held:

1. Liability may not be imposed under § 1981 without proof of intentional discrimination. This conclusion is supported by the legislative history. The fact that the prohibitions of § 1981 encompass private as well as governmental action does not suggest that the statute reaches more than purposeful discrimination, whether public or private. Pp. 7–15.

2. The District Court was unable to find discriminatory intent on petitioners' part, and liability under § 1981 cannot be vicariously imposed on them based on the discriminatory conduct of the union or the JATC. Pp. 15–21.

(a) There is no basis for holding petitioners liable under the doctrine of *respondeat superior*. The union, in operating the hiring hall, performed no function as the agent or servant of petitioner trade associations. Nor can the relationship between petitioner employers and the union be characterized as one between principal and agent without proof of a right to control the union's activities. Such a conception is alien to the fundamental assumption upon which the federal labor laws are structured and was not established by the evidence on which the District Court relied. And there is no evidence that an agency relationship existed between petitioners and the JATC. The fact that the employers fund the JATC does not render the JATC the employers' servant or agent, nor does the fact that the trade associations appoint half of the JATC's members infer a right of the associations to control the JATC. Pp. 15–19.

(b) Nor is there any basis for holding petitioners liable on the ground that § 1981 imposes a "nondelegable duty" on them to see that discrimination does not occur in the selection of their work force. Section 1981 does no more than prohibit petitioners from intentionally depriving black workers of the rights enumerated in the statute, including the equal right to contract, and was not intended to make them guarantors of the workers' rights against third parties who would infringe them. Pp. 19–21.

Syllabus

3. The District Court had no inherent power under its traditional equitable authority to allocate to petitioners a portion of the costs of the remedial decree, absent a supportable finding of liability upon petitioners' part. Nor does the All Writs Act constitute an independent basis for the injunctive portions of the District Court's order running against petitioners. There was no need to treat petitioners as strangers to the suit and therefore to rely upon some extraordinary form of procedure or writ to bring them before the court, since they were named as defendants and litigated the issue of injunctive liability. Pp. 22–27.

648 F. 2d 923, reversed and remanded.

REHNQUIST, J., delivered the opinion of the Court, in which BURGER, C. J., and WHITE, BLACKMUN, POWELL, and O'CONNOR, JJ., joined, and in Parts III and IV of which STEVENS, J., joined. O'CONNOR, J., filed a concurring opinion, in which BLACKMUN, J., joined. STEVENS, J., filed an opinion concurring in part and concurring in the judgment. MARSHALL, J., filed a dissenting opinion, in which BRENNAN, J., joined.

NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D.C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

SUPREME COURT OF THE UNITED STATES

Nos. 81–280, 81–330, 81–331, 81–332 AND 81–333

GENERAL BUILDING CONTRACTORS ASSOCIATION, INC., PETITIONER
81–280 *v.*
PENNSYLVANIA ET AL.

UNITED ENGINEERS & CONSTRUCTORS, INC., PETITIONER
81–330 *v.*
PENNSYLVANIA ET AL.

CONTRACTORS ASSOCIATION OF EASTERN PENNSYLVANIA AND UNITED CONTRACTORS ASSOCIATION, PETITIONERS
81–331 *v.*
PENNSYLVANIA ET AL.

GLASGOW, INC., PETITIONER
81–332 *v.*
PENNSYLVANIA ET AL.

BECHTEL POWER CORPORATION, PETITIONER
81–333 *v.*
PENNSYLVANIA ET AL.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

[June 29, 1982]

JUSTICE REHNQUIST delivered the opinion of the Court.

Respondents, the Commonwealth of Pennsylvania and a class of racial minorities who are skilled or seek work as operating engineers in the construction industry in Eastern Pennsylvania and Delaware, commenced this action under a variety of federal statutes protecting civil rights, including 42 U. S. C. § 1981. The complaint sought to redress racial discrimination in the operation of an exclusive hiring hall established in contracts between Local 542 of the International Union of Operating Engineers and construction industry employers doing business within the Union's jurisdiction. Respondents also alleged discrimination in the operation of an apprenticeship program established by Local 542 and several construction trade associations. Named as defendants were Local 542, the trade associations, the organization charged with administering the trade's apprenticeship program, and a class of approximately 1,400 construction industry employers. Petitioners, the defendant contractors and trade associations, seek review of a judgment granting an injunction against them. The questions we resolve are whether liability under 42 U. S. C. § 1981 requires proof of discriminatory intent and whether, absent such proof, liability can nevertheless be imposed vicariously on the employers and trade associations for the discriminatory conduct of the Union.

I

The hiring hall system that is the focus of this litigation originated in a collective bargaining agreement negotiated in 1961 by Local 542 and four construction trade associations in the Philadelphia area, three of whom are petitioners in this Court.[1] The agreement was concluded only after a ten-week strike prompted by the resistance of the trade associations to the Union's demand for an exclusive hiring hall.[2] Under the terms of the agreement, the Union was to maintain lists of operating engineers, or would-be engineers, classified according to the extent of their recent construction experience. Signatory employers were contractually obligated to hire operating engineers only from among those referred by the Union from its current lists. Workers affiliated with the Union were barred from seeking work with those employers except through Union referrals. Thus, the collective bargaining agreement effectively channeled all employment opportunities through the hiring hall. Since 1961 this requirement has been a constant feature of contracts negotiated with Local 542 by the trade associations, as well as of contracts signed with the Union by employers who were not represented by one of those associations in collective bargaining.[3]

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[1] The petitioner associations are the General Building Contractors Association (GBCA), the Contractors Association of Eastern Pennsylvania (CAEP), and the United Contractors Association (UCA). The fourth group, the Pennsylvania Excavating Contractors Association, was dis-

Among the means of gaining access to the Union's referral lists is an apprenticeship program established in 1965 by Local 542 and the trade associations. The program, which involves classroom and field training, is administered by the Joint Apprenticeship and Training Committee (JATC), a body of trustees half of whom are appointed by the Union and half by the trade associations. While enrolled in the program, apprentices are referred by the Union for unskilled construction work. Graduates of the program become jour-

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solved in 1972 after the commencement of this action.

[2] A second strike occurred in 1963 when the contractor associations unsuccessfully sought to remove the hiring hall provision from the area collective bargaining agreement.

[3] The District Court found that "a vast majority of the employers are not and have not been active members of the defendant associations." *Pennsylvania* v. *Local 542, Int'l Union of Operating Engineers*, 469 F. Supp. 329, 342 (ED Pa. 1978). Nevertheless, the court found that "the negotiations conducted by those bodies have established a standard to which the unaffiliated contractors may conform." *Ibid.*

neymen operating engineers and are referred for heavy equipment jobs.

This action was filed in 1971 by the Commonwealth of Pennsylvania and 12 black plaintiffs representing a proposed class of minority group members residing within the jurisdiction of Local 542. The complaint charged that the Union and the JATC had violated numerous state and federal laws prohibiting employment discrimination, including Title VII of the Civil Rights Act of 1964, 78 Stat. 253, as amended, 42 U. S. C. § 2000e *et seq.*, and 42 U. S. C. § 1981. The complaint alleged that these defendants had engaged in a pattern and practice of racial discrimination, by systematically denying access to the Union's referral lists, and by arbitrarily skewing referrals in favor of white workers, limiting most minority workers who did gain access to the hiring hall to jobs of short hours and low pay. The contractor employers and trade associations were also named as defendants, although the complaint did not allege a Title VII cause of action against them.[4]

The District Court divided the trial into two stages. See *Pennsylvania* v. *Local 542, Int'l Union of Operating Engineers*, 469 F. Supp. 329, 348 (ED Pa. 1978). The first stage, from which petitioners appeal, addressed issues of liability; assessment of damages was deferred to a second stage. For purposes of the first phase of the proceedings, the court certified a plaintiff class of minority operating engineers and would-be engineers, as well as a defendant class consisting of all trade associations and employers who had been parties to labor contracts with Local 542. A single employer, petitioner Glasgow, Inc., was certified to represent the defendant subclass of approximately 1,400 contractor employers.[5]

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[4] The complaint did not assert a Title VII cause of action against petitioners because they were not named in the complaint filed by the plaintiffs with the EEOC, a precondition to suit in federal court. See Brief for Individual and Class Respondents 12, n. 18.

[5] Certification of this class evidently was influenced by the District

The District Court's opinion in the liability phase of the trial is lengthy. For our purposes, however, the relevant findings and conclusions can be summarized briefly. First, the court found that the hiring hall system established by collective bargaining was neutral on its face. *Id.*, at 342. Indeed, after May 1, 1971, the contracts contained a provision expressly prohibiting employment discrimination on the basis of race, religion, color, or national origin. *Id.*, at 340 and n. 6. But the court found that Local 542, in administering the system, "practiced a pattern of intentional discrimination and that union practices in the overall operation of a hiring hall for operating engineers created substantial racial disparities." *Id.*, at 370. The court made similar findings regarding the JATC's administration of the job training program. *Id.*, at 384. On the basis of these findings, the District Court held that Local 542 and the JATC had violated Title VII, both because they intentionally discriminated and because they enforced practices that resulted in a disparate racial impact. *Id.*, at 397–399.[6] The court also interpreted 42 U. S. C. § 1981 to permit imposition of liability "on roughly the same basis as a Title VII claim," *id.*, at 401, and therefore concluded that the Union and the JATC had also violated § 1981. *Id.*, at 399–401.

Turning to petitioners' liability under § 1981, the court found that the plaintiffs had failed to prove "that the associa-

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Court's conclusion that liability could be imposed without regard to individualized issues such as the intent or workforce statistics of the individual employers. See 469 F. Supp., at 384, 414. The court emphasized that the determination of liability in damages could require individualized proof; it therefore held out the possibility that the defendant class might be decertified in the second stage of the proceedings. *Id.*, at 413, 415, 419–420.

[6] The District Court's legal conclusions addressed only the liability of Local 542. The court explained: "Because of the JATC's participation in the overall intentional discrimination of the union, there is no need to discuss its legal liability separately. The JATC is liable as the union is liable." 469 F. Supp., at 401, n. 52.

tions or contractors viewed simply as a class were actually aware of the union discrimination," *id.*, at 401, and had failed to show "intent to discriminate by the employers as a class," *id.*, at 412. Nevertheless, the court held the employers and the associations liable under § 1981 for the purpose of imposing an injunctive remedy "as a result of their contractual relationship to and use of a hiring hall system which in practice effectuated intentional discrimination, whether or not the employers and associations knew or should have known [of the Union's conduct]." *Id.*, at 401. The court reasoned that liability under § 1981 "requires no proof of purposeful conduct on the part of any of the defendants." *Id.*, at 407. Instead, it was sufficient that "(1) the employers delegated an important aspect of their hiring procedure to the union; [and that] (2) the union, in effectuating the delegation, intentionally discriminated or, alternatively, produced a discriminatory impact." *Id.*, at 412. "[P]laintiffs have shown that the requisite relationship exists among employers, associations, and union to render applicable the theory of *respondeat superior*, thus making employers and associations liable injunctively for the discriminatory acts of the union." *Id.*, at 413.[7]

Following an appeal authorized by 28 U. S. C. § 1292(b), the Court of Appeals for the Third Circuit, sitting en banc, affirmed the judgment of liability against petitioners by an equally divided vote. 648 F. 2d 923 (1981). We granted certiorari, 454 U. S. —— (1981), and we now reverse.

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[7] The District Court absolved petitioners of liability under 42 U. S. C. § 1985(3), noting that "no per se or vicarious liability theory could be used to hold a class of employers liable for conspiracy to commit the discrimination practiced by the union." *Id.*, at 413. Absent such a theory, the plaintiffs could not prevail because "there was no sufficient proof that as a class the employers agreed to violate equal protection rights or equal privileges and immunities." *Ibid.* Moreover, "[n]ot even acquiescence of the whole class of employers in the sense of a conscious toleration of the discrimination of the union ha[d] been shown." *Ibid.*

In light of its disposition, the court found it unnecessary to address other causes of action alleged by the plaintiffs. See *id.*, at 386, n. 43.

II

The District Court held that petitioners had violated 42 U. S. C. § 1981 notwithstanding its finding that, as a class, petitioners did not intentionally discriminate against minority workers and neither knew nor had reason to know of the Union's discriminatory practices. The first question we address, therefore, is whether liability may be imposed under § 1981 without proof of intentional discrimination.[8]

Title 42 U. S. C. § 1981 provides:

> "All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property

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[8] The District Court concluded, by analogy to Title VII, that a violation of § 1981 could be made out by "proof of disparate impact alone." *Id.*, at 401. The court referred to *Griggs* v. *Duke Power Co.*, 401 U. S. 424 (1971), in which we held that Title VII forbids the use of employment tests that produce a disproportionate racial impact unless the employer shows "a manifest relationship to the employment in question," *id.*, at 432. See *Teamsters* v. *United States*, 431 U. S. 324, 335–336 (1977).

The District Court's holding on this issue is contrary to the holding of every Court of Appeals that has addressed the matter, including that of the Third Circuit in a subsequent case. See *Guardians Assn.* v. *Civil Service Comm'n*, 633 F. 2d 232, 263–268 (CA2 1980), cert. granted, No. 81–431 (Jan. 11, 1982); *Croker* v. *Boeing Co.*, 662 F. 2d 975, 984–989 (CA3 1981) (en banc); *Williams* v. *DeKalb Cty.*, 582 F. 2d 2 (CA5 1978); *Mescall* v. *Burrus*, 603 F. 2d 1266, 1269–1271 (CA7 1979); *Craig* v. *County of Los Angeles*, 626 F. 2d 659, 668 (CA9 1980), cert. denied, 450 U. S. 919 (1981); *Chicano Police Officer's Assn.* v. *Stover*, 552 F. 2d 918, 920–921 (CA10 1977). Two other circuits have approved a requirement of discriminatory intent in dicta. See *Des Vergnes* v. *Seekonk Water Dist.*, 601 F. 2d 9, 14 (CA1 1979); *Detroit Police Officers' Assn.* v. *Young*, 608 F. 2d 671, 692 (CA6 1979), cert. denied, 452 U. S. 938 (1981). See also *Johnson* v. *Alexander*, 572 F. 2d 1219, 1223–1224 (CA8), cert. denied, 439 U. S. 986 (1978); *Donnell* v. *General Motors Corp.*, 576 F. 2d 1292, 1300 (CA8 1978). But see *Kinsey* v. *First Regional Securities, Inc.*, 557 F. 2d 830, 838, n. 22 (CADC 1977).

> as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other."

We have traced the evolution of this statute and its companion, 42 U. S. C. § 1982,[9] on more than one occasion, see, *e. g.*, *McDonald* v. *Santa Fe Trail Transp. Co.*, 427 U. S. 273, 287–296 (1976); *Runyon* v. *McCrary*, 427 U. S. 160, 168–170 (1976); *Jones* v. *Alfred H. Mayer Co.*, 392 U. S. 409, 422–437 (1968), and we will not repeat the narrative again except in broad outline.

The operative language of both laws apparently originated in § 1 of the Civil Rights Act of 1866, 14 Stat. 27, enacted by Congress shortly after ratification of the Thirteenth Amendment.[10] "The legislative history of the 1866 Act clearly indicates that Congress intended to protect a limited category of rights, specifically defined in terms of racial equality." *Georgia* v. *Rachel*, 384 U. S. 780, 791 (1966). The same Congress also passed the joint resolution that was later adopted as the Fourteenth Amendment. See Cong. Globe, 39th Cong., 1st Sess. 3148–3149, 3042. As we explained in

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[9] Section 1982 provides:

"All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property."

[10] Section 1 of the Act of Apr. 9, 1866, read in part:

"That all persons born in the United States and not subject to any foreign power, . . . are hereby declared to be citizens of the United States; and such citizens, of every race and color, without regard to any previous condition of slavery or involuntary servitude, . . . shall have the same right, in every State and Territory in the United States, to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property, and to full and equal benefit of all laws and proceedings for the security of person and property, as is enjoyed by white citizens, and shall be subject to like punishment, pains, and penalties, and to none other, any law, statute, ordinance, regulation, or custom, to the contrary notwithstanding."

Hurd v. *Hodge*, 334 U. S. 24, 32–33 (1948) (footnotes omitted):

> "Frequent references to the Civil Rights Act are to be found in the record of the legislative debates on the adoption of the Amendment. It is clear that in many significant respects the statute and the Amendment were expressions of the same general congressional policy. Indeed, as the legislative debates reveal, one of the primary purposes of many members of Congress in supporting the adoption of the Fourteenth Amendment was to incorporate the guaranties of the Civil Rights Act of 1866 in the organic law of the land. Others supported the adoption of the Amendment in order to eliminate doubt as to the constitutional validity of the Civil Rights Act as applied to the States."

Following ratification of the Fourteenth Amendment, Congress passed what has come to be known as the Enforcement Act of 1870, 16 Stat. 140, pursuant to the power conferred by § 5 of the Amendment. Section 16 of that Act contains essentially the language that now appears in § 1981.[11] Indeed, the present codification is derived from § 1977 of the Revised

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[11] "That all persons within the jurisdiction of the United States shall have the same right in every State and Territory in the United States to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of person and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and none other, any law, statute, ordinance, regulation, or custom to the contrary notwithstanding. No tax or charge shall be imposed or enforced by any State upon any person immigrating thereto from a foreign country which is not imposed and enforced upon every person immigrating to such State from any other foreign country; and any law of any State in conflict with this provision is hereby declared null and void." 16 Stat. 144.

Section 18 of the 1870 Act also re-enacted the 1866 Act and declared that § 16 "shall be enforced according to the provisions of said act." 16 Stat. 144.

Statutes of 1874, which in turn codified verbatim § 16 of the 1870 Act. Section 16 differed from § 1 of the 1866 Act in at least two respects. First, where § 1 of the 1866 Act extended its guarantees to "citizens, of every race and color," § 16 of the 1870 Act—and § 1981—protects "all persons." See *United States* v. *Wong Kim Ark*, 169 U. S. 649, 675 (1898). Second, the 1870 Act omitted language contained in the 1866 Act, and eventually codified as § 1982, guaranteeing property rights equivalent to those enjoyed by white citizens. Thus, "[a]lthough the 1866 Act rested only on the Thirteenth Amendment . . . and, indeed, was enacted before the Fourteenth Amendment was formally proposed, . . . the 1870 Act was passed pursuant to the Fourteenth, and changes in wording may have reflected the language of the Fourteenth Amendment." *Tillman* v. *Wheaton-Haven Recreation Assn.*, 410 U. S. 431, 439–440, n. 11 (1973). See *Runyon* v. *McCrary*, *supra*, at 168–170, n. 8.

In determining whether § 1981 reaches practices that merely result in a disproportionate impact on a particular class, or instead is limited to conduct motivated by a discriminatory purpose, we must be mindful of the "events and passions of the time" in which the law was forged. *United States* v. *Price*, 383 U. S. 787, 803 (1966). The Civil War had ended in April 1865. The First Session of the Thirty-ninth Congress met on December 4, 1865, some six months after the preceding Congress had sent to the States the Thirteenth Amendment and just two weeks before the Secretary of State certified the Amendment's ratification. On January 5, 1866, Senator Trumbull introduced the bill that would become the 1866 Act.[12]

The principal object of the legislation was to eradicate the Black Codes, laws enacted by Southern legislatures imposing a range of civil disabilities on freedmen.[13] Most of these laws embodied express racial classifications and although others, such as those penalizing vagrancy, were facially neutral, Congress plainly perceived all of them as consciously conceived methods of resurrecting the incidents of slavery.[14] Senator Trumbull summarized the paramount aims of his bill:

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[12] Cong. Globe, 39th Cong., 1st Sess. 129.

[13] Discussion of the Black Codes occupied a central place in the congres-

> "Since the abolition of slavery, the Legislatures which have assembled in the insurrectionary States have passed laws relating to the freedmen, and in nearly all the States they have discriminated against them. They deny them certain rights, subject them to severe penalties, and still impose upon them the very restrictions which were imposed upon them in consequence of the existence of slavery, and before it was abolished. The purpose of the bill under consideration is to destroy all these discriminations, and to carry into effect the [Thirteenth] amendment." Cong. Globe, 39th Cong., 1st Sess. 474 (1866).

Senator Trumbull emphasized: "This bill has nothing to do with the political rights or *status* of parties. It is confined exclusively to their civil rights, such rights as should appertain to every free man." *Id.*, at 476 (emphasis in original).

Of course, this Court has found in the legislative history of the 1866 Act evidence that Congress sought to accomplish more than the destruction of state-imposed civil disabilities

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sional debates leading to enactment of the 1866 Act. See *id.*, at 588–589 (remarks of Rep. Donnelly); 602 (Sen. Lane); 603 (Sen. Wilson); 1123–1124 (Rep. Cook); 1118–1119 (Rep. Wilson); 1151–1152, 1153 (Rep. Thayer); 1160 (Rep. Windom); 1785 (Sen. Stewart); 1833–1835 (Rep. Lawrence); 1838–1839 (Rep. Clarke). The Codes are described in E. McPherson, The Political History of the United States of America During the Period of Reconstruction 29–44 (1871).

[14] See, *e. g.*, *id.*, at 1124 (Rep. Cook); 1151–1152 (Rep. Thayer); 1159 (Rep. Windom); 1785 (Sen. Stewart); 1839 (Rep. Clarke). See also *Memphis* v. *Greene*, 451 U. S. 100, 131–135 (1981) (WHITE, J., concurring in the judgment).

and discriminatory punishments. We have held that both § 1981 and § 1982 "prohibit all racial discrimination, whether or not under color of law, with respect to the rights enumerated therein." *Jones* v. *Alfred H. Mayer Co.*, 392 U. S., at 436. See *Johnson* v. *Railway Express Agency*, 421 U. S. 454, 459–460 (1975); *Runyon* v. *McCrary*, 427 U. S., at 168. Nevertheless, the fact that the prohibitions of § 1981 encompass private as well as governmental action does not suggest that the statute reaches more than purposeful discrimination, whether public or private. Indeed, the relevant opinions are hostile to such an implication. Thus, although we held in *Jones*, *supra*, that § 1982 reaches private action, we explained that § 1 of the 1866 Act "was meant to prohibit all *racially motivated* deprivations of the rights enumerated in the statute." 392 U. S., at 426 (emphasis added). Similarly, in *Runyon* v. *McCrary*, *supra*, we stated that § 1981 would be violated "if a private offeror refuses to extend to a Negro, *solely because he is a Negro*, the same opportunity to enter into contracts as he extends to white offerees." 427 U. S., at 170–171.

The immediate evils with which the Thirty-ninth Congress was concerned simply did not include practices that were "neutral on their face, and even neutral in terms of intent," *Griggs* v. *Duke Power Co.*, 401 U. S. 424, 430 (1971), but that had the incidental effect of disadvantaging blacks to a greater degree than whites. Congress instead acted to protect the freedmen from intentional discrimination by those whose object was "to make their former slaves dependent serfs, victims of unjust laws, and debarred from all progress and elevation by organized social prejudices." Cong. Globe, 39th Cong., 1st Sess. 1839 (1866) (Rep. Clarke). See *Memphis* v. *Greene*, 451 U. S. 100, 131–135 (1981) (WHITE, J., concurring in the judgment). The supporters of the bill repeatedly emphasized that the legislation was designed to eradicate blatant deprivations of civil rights, clearly fashioned with the purpose of oppressing the former slaves. To infer that Congress sought to accomplish more than this would require stronger evidence in the legislative record than we have been able to discern.[15]

Our conclusion that § 1981 reaches only purposeful discrimination is supported by one final observation about its legislative history. As noted earlier, the origins of the law can be traced to both the Civil Rights Act of 1866 and the Enforcement Act of 1870. Both of these laws, in turn, were legislative cousins of the Fourteenth Amendment. The 1866 Act represented Congress' first attempt to ensure equal rights for the freedmen following the formal abolition of slavery effected by the Thirteenth Amendment. As such, it constituted an initial blueprint of the Fourteenth Amendment, which Congress proposed in part as a means of "incorporat-

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[15] We attach significance to the fact that throughout much of the congressional debates, S. B. 61, which became the 1866 Act, contained an opening declaration that "there shall be no discrimination in civil rights or immunities among citizens of the United States in any State or Territory of the United States *on account of race, color, or previous condition of slavery.*" See *id.*, at 474. This passage had occasioned controversy in both the Senate and the House because of the breadth of the phrase "civil rights and immunities." After the Senate had passed the bill and as debates in the House were drawing to a close, the bill's floor manager, Rep. Wilson, introduced an amendment proposed by the House Judiciary Committee, of which he was also the chairman. That amendment deleted the language quoted above and left the bill as it would read when ultimately enacted. See n. 10, *supra*. Rep. Wilson explained that the broad language of the original bill could have been interpreted to encompass the right of suffrage and other political rights. "To obviate that difficulty and the difficulty growing out of any other construction beyond the specific rights named in the section, our amendment strikes out all of those general terms and leaves the bill with the rights specified in the section." Cong. Globe 39th Cong., 1st Sess. 1367. See *McDonald* v. *Santa Fe Trail Transp. Co.*, 427 U. S. 273, 292, n. 22 (1976). The deleted language, emphasized above, strongly suggests that Congress was primarily concerned with intentional discrimination. That the passage was removed in an effort to *narrow* the scope of the legislation sharply undercuts the view that the 1866 Act reflects broader concerns.

[ing] the guaranties of the Civil Rights Act of 1866 in the organic law of the land." *Hurd* v. *Hodge*, 334 U. S., at 32.[16] The 1870 Act, which contained the language that now appears in § 1981, was enacted as a means of enforcing the recently ratified Fourteenth Amendment. In light of the close connection between these Acts and the Amendment, it would be incongruous to construe the principal object of their successor, § 1981, in a manner markedly different from that of the Amendment itself.[17]

With respect to the latter, "official action will not be held unconstitutional solely because it results in a racially disproportionate impact," *Arlington Heights* v. *Metropolitan Housing Dev. Corp.*, 429 U. S. 252, 264–265 (1977). "[E]ven if a neutral law has a disproportionately adverse impact upon a racial minority, it is unconstitutional under the Equal Protection Clause only if that impact can be traced to a discriminatory purpose." *Personnel Administrator of Mass.* v. *Feeney*, 442 U. S. 256, 272 (1979). See *Washington* v. *Davis*, 426 U. S. 229 (1976). The same Congress that proposed the Fourteenth Amendment also passed the Civil Rights Act of 1866, and the ratification of that amendment paved the way for the Enforcement Act of 1870. These measures were all products of the same milieu and were directed against the same evils. Although Congress might have charted a different course in enacting the predecessors to § 1981 than it did in proposing the Fourteenth Amendment, we have found no convincing evidence that it did so.

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[16] See, *e. g.*, Cong. Globe, 39th Cong., 1st Sess. 1294 (1866) (Rep. Wilson); *id.* at 2465 (Rep. Thayer).

[17] It is true that § 1981, because it is derived in part from the 1866 Act, has roots in the Thirteenth as well as the Fourteenth Amendment. Indeed, we relied on that heritage in holding that Congress could constitutionally enact § 1982, which is also traceable to the 1866 Act, without limiting its reach to "state action." See *Jones* v. *Alfred H. Mayer Co.*, 392 U. S., at 438. As we have already intimated, however, the fact that Congress acted in the shadow of the Thirteenth Amendment does not demonstrate that Congress sought to eradicate more than purposeful discrimination when it passed the 1866 Act. For example, Congress also enacted 42 U. S. C. § 1985(3) in part to implement the commands of the Thirteenth Amendment. See *Griffin* v. *Breckenridge*, 403 U. S. 88, 104–105 (1971). While holding that § 1985(3) does not require state action but also reaches private conspiracies, we have emphasized that a violation of the statute requires "some racial, or perhaps otherwise class-based, invidiously discriminatory animus behind the conspirators' action." *Id.*, at 102.

We need not decide whether the Thirteenth Amendment itself reaches practices with a disproportionate effect as well as those motivated by discriminatory purpose, or indeed whether it accomplished anything more than the abolition of slavery. See *Memphis* v. *Greene*, 451 U. S. 100, 125–126 (1981). We conclude only that the existence of that Amendment, and the fact that it authorized Congress to enact legislation abolishing the "badges and incidents of slavery," *Civil Rights Cases*, 109 U. S. 3, 20 (1883), do not evidence congressional intent to reach disparate effects in enacting § 1981.

We conclude, therefore, that § 1981, like the Equal Protection Clause, can be violated only by purposeful discrimination.

III

The District Court held petitioners liable under § 1981 notwithstanding its finding that the plaintiffs had failed to prove intent to discriminate on the part of the employers and associations as a class. In light of our holding that § 1981 can be violated only by intentional discrimination, the District Court's judgment can stand only if liability under § 1981 can properly rest on some ground other than the discriminatory motivation of the petitioners themselves. Both the District Court and respondents have relied on such grounds, but we find them unconvincing.

A

The District Court reasoned that liability could be vicariously imposed upon the employers and associations, based upon the intentional discrimination practiced by Local 542 in its operation of the hiring hall. The court's theory was that petitioners had delegated to the "union hiring hall" the authority to select workers as "the agent for two principals—the union and the contractors, with their respective associations." 469 F. Supp., at 411. Since the hiring hall came into existence only through the agreement of petitioners, and since the exclusive hiring hall was the means by which "the intentional discrimination of the union was able to work its way broadly into the common workforce of operating engineers," *id.*, at 412, the court concluded that "[t]he acts of the union therefore justify imposition of responsibility upon those employers participating in the original delegation," *ibid.* The effect of this holding, as the court recognized, was to impose a "duty to see that discrimination does not take place in the selection of one's workforce," regardless of where the discrimination originates. *Ibid.*

As applied to the petitioner associations, the District Court's theory is flawed on its own terms. The doctrine of *respondeat superior*, as traditionally conceived and as understood by the District Court, see *id.*, at 411, enables the imposition of liability on a principal for the tortious acts of his agent and, in the more common case, on the master for the wrongful acts of his servant. See Restatement (Second) of Agency §§215–216, 219 (1958); W. Prosser, Handbook of the Law of Torts §§69–70 (4th ed. 1971); W. Seavey, Handbook of the Law of Agency §83 (1964). "Agency is the fiduciary relation which results from the manifestation of consent by one person to another that the other shall act on his behalf and subject to his control, and consent by the other so to act." Restatement (Second) of Agency §1 (1958). A master-servant relationship is a form of agency in which the master employs the servant as "an agent to perform service in his affairs" and "controls or has the right to control the physical conduct of the other in the performance of the service." *Id.*, §2. See 2 F. Harper & F. James, The Law of Torts §26.6 (1956). Local 542, in its operation of the hiring hall, simply performed no function as the agent or servant of the associations. The record demonstrates that the associations themselves do not hire operating engineers, and never have. Their primary purpose is to represent certain employers in contract negotiations with the Union. Even if the doctrine of *respondeat superior* were broadly applicable to suits based on § 1981, therefore, it would not support the imposition of liability on a defendant based on the acts of a party with whom it had no agency or employment relationship.[18]

We have similar difficulty in accepting the application of traditional *respondeat superior* doctrine to the class of contractor employers. In the run of cases, the relationship between an employer and the union that represents its employees simply cannot be accurately characterized as one between principal and agent or master and servant. Indeed, such a conception is alien to the fundamental assumptions upon which the federal labor laws are structured.

At the core of agency is a "fiduciary relation" arising from the "consent by one person to another that the other shall act on his behalf and subject to his control." Restatement (Second) of Agency § 1. Equally central to the master-servant relation is the master's control over or right to control the physical activities of the servant. See Restatement (Second) of Agency § 220; 2 F. Harper & F. James, *supra,* § 26.3; W. Seavey, *supra,* § 84, p. 142. See also *Logue* v. *United States,* 412 U. S. 521, 527 (1973). The District Court found that the requirement of control was satisfied because "the employers retained power to oppose the union discrimination." 469 F. Supp., at 411, n. 61. However, the "power to oppose" the Union, even when the opposition is grounded in the terms of the collective bargaining agreement, is not tantamount to a "right to control" the Union. See *Lummus Co.*

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[18] In this case, the associations were held liable because they negotiated an agreement, fair on its face, which was later implemented by another party in a manner that was not only discriminatory but in violation of the agreement itself *and* in a manner of which the associations were neither aware nor had reason to be aware. Since the associations' only role was as agent for employers whose hiring would actually be governed by the agreement, the District Court's theory presumably would also permit the imposition of liability on the attorneys who actually conducted the contract negotiations. We are unaware of any authority supporting such an extended application of *respondeat superior.*

v. *NLRB*, 339 F. 2d 728, 735 (CADC 1964).[19] Indeed, a rule equating the two would convert every contractual relationship into an agency relationship, a result clearly unsupported by the common-law doctrines on which the District Court relied.

The District Court's assumptions about the relation between the Union and the class of employers with whom it has contracted also runs counter to the premises on which the federal labor laws have been constructed. While authorizing collective bargaining and providing means of enforcing the resultant contracts, the National Labor Relations Act expressly prohibits employers from compromising the independence of labor unions. See 49 Stat. 452, as amended, 29 U. S. C. § 158(a); 61 Stat. 157, as amended, 29 U. S. C. § 186. The entire process of collective bargaining is structured and regulated on the assumption that "[t]he parties—even granting the modification of views that may come from a realization of economic interdependence—still proceed from contrary and to an extent antagonistic viewpoints and concepts of self-interest." *NLRB* v. *Insurance Agents*, 361 U. S. 477, 488 (1960). See *Vaca* v. *Sipes*, 386 U. S. 171, 177 (1967). We have no reason to doubt the validity of that assumption in the instant case.

Respondents also suggest that petitioners can be held vicariously liable for the discriminatory conduct of the JATC. They argue that the JATC is properly viewed as an agent of both Local 542 and the associations, emphasizing that half of the trustees charged with administering the JATC are appointed by the associations and that the JATC is wholly funded by mandatory contributions from the employers. We note initially that the District Court premised petitioners' liability not on the actions of the JATC, but on the discriminatory conduct of the Union. See 469 F. Supp., at 411–413. The record, therefore, contains no findings regarding the relationship between the JATC and petitioners, beyond those noted above, that might support application of *respondeat superior.*

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[19] According to respondents, the District Court's conclusion that petitioners retained the power to control the hiring hall was a finding of fact that cannot be set aside unless clearly erroneous. We disagree. The District Court found that petitioners had the "power to oppose" the Union, a conclusion we do not question. Whether the power to oppose the Union is equivalent to a right of control sufficient to invoke the doctrine of *respondeat superior* is, however, a legal question to which we must devote our independent judgment.

The facts emphasized by respondents, standing alone, are inadequate. That the employers fund the activities of the JATC does not render the JATC the employers' servant or agent any more than an independent contractor is rendered an agent simply because he is compensated by the principal for his services. The employers must also enjoy a right to control the activities of the JATC, and there is no record basis for believing that to be the case. Neither is a right of control inferable merely from the power of the associations to appoint half of the JATC's trustees. It is entirely possible that the trustees, once appointed, owe a fiduciary duty to the JATC and the apprentices enrolled in its programs, rather than to the entities that appointed them. Cf. *NLRB* v. *Amax Coal Co.*, 453 U. S. 322 (1981). On the assumption that *respondeat superior* applies to suits based on § 1981, there is no basis for holding either the employers or the associations liable under that doctrine without evidence that an agency relationship existed at the time the JATC committed the acts on which its own liability was premised.

B

The District Court also justified its result by concluding that § 1981 imposes a "nondelegable duty" on petitioners "to see that discrimination does not take place in the selection of [their] workforce." 469 F. Supp., at 412.[20] The concept of a nondelegable duty imposes upon the principal not merely an obligation to exercise care in his own activities, but to answer for the well being of those persons to whom the duty runs. See Restatement (Second) of Agency § 214. The duty is not discharged by using care in delegating it to an independent contractor. Consequently, the doctrine creates an exception to the common-law rule that a principal normally will not be liable for the tortious conduct of an independent contractor. See 2 F. Harper & F. James, *supra*, § 26.11, pp. 1405–1408; W. Prosser, *supra*, § 70, p. 467; § 71, p. 470. So understood, a nondelegable duty is an affirmative obligation to ensure the protection of the person to whom the duty runs.

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[20] The court relied on § 214 of the Restatement (Second) of Agency:

In a sense, to characterize such a duty as "nondelegable" is merely to restate the duty. Thus, in this litigation the question is not whether the employers and associations are free to delegate their duty to abide by § 1981, for whatever duty the statute imposes, they are bound to adhere to it. The question is *what* duty does § 1981 impose. More precisely, does § 1981 impose a duty to refrain from intentionally denying blacks the right to contract on the same basis as whites or does it impose an affirmative obligation to ensure that blacks enjoy such a right? The language of the statute does not speak in terms of duties. It merely declares specific rights held by "[a]ll persons within the jurisdiction of the United States." We are confident that the Thirty-ninth Congress meant to do no more than prohibit the employers and associations in these cases from intentionally depriving black workers of the rights enumerated in the statute, including the equal right to contract. It did not intend to make them the guarantors of the workers' rights as against third parties who

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"A master or other principal who is under a duty to provide protection for or to have care used to protect others or their property and who confides the performance of such duty to a servant or other person is subject to liability to such others for harm caused to them by the failure of such agent to perform the duty."

would infringe them. Cf. *Furnco Construction Corp.* v. *Waters*, 438 U. S. 567, 577–578 (1978) (Title VII); *Rizzo* v. *Goode*, 423 U. S. 362, 376–377 (1976) (42 U. S. C. § 1983).

Our earlier holding that § 1981 reaches only intentional discrimination virtually compels this conclusion. It would be anomalous to hold that § 1981 could be violated only by intentional discrimination and then to find this requirement satisfied by proof that the individual plaintiffs did not enjoy "the same right . . . to make and enforce contracts . . . as is enjoyed by white citizens" and that the defendants merely failed to ensure that the plaintiffs enjoyed employment opportunities equivalent to that of whites. Such a result would be particularly inappropriate in the case of the associations, who are not engaged in the construction business, do not employ operating engineers, and consequently did not delegate to the Union any hiring functions which they otherwise would have performed themselves. Neither the District Court nor respondents identify anything in the language or legislative history of the statute to support a contrary conclusion.[21]

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[21] Respondents also contend that petitioners can be held liable on the theory that the hiring hall was a "joint enterprise" involving petitioners as well as the Union. They point to language in the District Court's opinion holding that "the union hiring hall was the agent for two principals—the union and the contractors with their respective associations." 469 F. Supp., at 411. Even this theory, however, requires, among other things, the existence of a mutual right of control as between the members of the enterprise. See Restatement (Second) of Torts § 491; 2 F. Harper & F. James, *supra*, § 26.13, p. 1414. For reasons we have already stated, there is no record basis for finding that petitioners had a right to control Local 542 in its administration of the hiring hall. We also doubt the validity of the assumption that the hiring hall is a separate entity, except perhaps as a physical structure. The District Court did not find, and respondents do not assert, that the hiring hall has a separate juridical existence. Indeed, in discussing the operation of the hiring hall, the District Court made clear that it was imposing liability on the basis of the *the Union's* conduct. As used in the court's opinion, the phrase "hiring hall" appears

IV

In a separate portion of their brief, respondents urge several independent bases for the issuance of an injunction against the petitioners and the allocation to them of a portion of the costs of the remedial decree. Respondents first assert that the court had inherent equitable power to allocate remedial costs among all the named defendants. They also rely on the All Writs Act, 28 U. S. C. § 1651(a), as an independent basis for the injunctive portions of the District Court's order running against petitioners. We shall deal with these contentions in turn.

The District Court in an opinion issued after judgment set forth the basis for its holding that "defendants held injunctively liable solely under a theory of vicarious responsibility are nevertheless liable for 'a share' of the costs under Rule 54(d)." 507 F. Supp. 1146, 1152 (1980). The District Court framed the inquiry before it as whether a party held vicariously liable to an injunction, but not for damages, might nonetheless have a proportionate share of the costs assessed against it. While this may have been an entirely appropriate frame of reference for the District Court, following its holding that petitioners were vicariously liable and therefore subject to an injunction, it is obviously not the proper frame of reference for our discussion. For the reasons previously stated, we have concluded that petitioners were not properly subject to an injunction on any of the theories set forth by the District Court. The issue before us, therefore, is whether a party not subject to liability for violating the law may nonetheless be assessed a proportionate share of the costs of implementing a decree to assure nondiscriminatory practices on the part of another party which *was* properly enjoined.

We find respondent's arguments based on the traditional

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to be no more than a shorthand reference for the referral process administered on a day-to-day basis by the Union.

equitable authority of courts to be unpersuasive. In *Milliken* v. *Bradley*, 433 U. S. 267 (1977), upon which respondents rely, and which we believe to be the case most closely in point, we expressly noted that the state petitioners had been found guilty of creating at least a portion of the constitutional violation which the order challenged in that case was designed to remedy. *Id.*, at 281–282, 289. Thus our holding there was consistent with our opinion in *Hills* v. *Gautreaux*, 425 U. S. 284 (1976), where we explained the relationship between our holding in the first *Milliken* case, *Milliken* v. *Bradley*, 418 U. S. 717 (1974), and our opinion in *Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U. S. 1 (1971). We read these earlier decisions as recognizing "fundamental limitations on the remedial powers of the federal courts." 425 U. S., at 293. Those powers could be exercised only on the basis of a violation of the law and could extend no farther than required by the nature and the extent of that violation. *Id.*, at 293–294. This principle, we held, was not one limited to school desegregation cases, but was instead "premised on a controlling principle governing the permissible scope of federal judicial power, a principle not limited to a school desegregation context." *Id.*, at 294, n. 11.

We think that the principle enunciated in these cases, transposed to the instant factual situation, offers no support for the imposition of injunctive relief against a party found not to have violated any substantive right of respondents. This is not to say that defendants in the position of petitioners might not, upon an appropriate evidentiary showing, be retained in the lawsuit and even subjected to such minor and ancillary provisions of an injunctive order as the District Court might find necessary to grant complete relief to respondents from the discrimination they suffered at the hands of the Union. See *Zipes* v. *Trans World Airlines, Inc.*, 454 U. S. —, — (1982). But that sort of minor and ancillary relief is not the same, and cannot be the same, as that awarded against a party found to have infringed the statutory rights of persons in the position of respondents.

The order of the District Court, insofar as it runs against petitioners, cannot be regarded as "minor" or "ancillary" in any proper sense of those terms. First, it imposes considerable burdens on the employers and associations. It directs the employers to meet detailed "minority utilization goals" in their hiring, keyed to the number of hours worked. App. to Pet. for Cert. in No. 81-280, p. 236. If they are unable to do so through referrals from Local 542, they are required to hire minority operating engineers who are not affiliated with the Union. *Ibid.* If the goals are still not satisfied, the employers must recruit and hire unskilled minority workers from the community and provide on-the-job training. *Id.*, at 236-237. The employers are also obligated to make quarterly reports detailing the extent of their compliance with these directives. *Id.*, at 241-242. Finally, the District Court imposed on the employers and the associations a share of the financial cost incidental to enforcement of the remedial decree as a whole. *Id.*, at 252-254. See 507 F. Supp. 1146 (1980). According to petitioners, the expense of the decree in the first year of its five-year life exceeded $200,000. See Brief for Petitioner GBCA 45, n. 77.

Absent a supportable finding of liability, we see no basis for requiring the employers or the associations to aid either in paying for the cost of the remedial program as a whole or in establishing and administering the training program. Nor is the imposition of minority hiring quotas directly upon petitioners the sort of remedy that may be imposed without regard to a finding of liability. If the Union and the JATC comply with the decree by training and referring minority workers, we see no reason to assume, absent supporting evidence, that the employers will not hire the minority workers referred pursuant to the collective bargaining agreement, and employ them at wages and hours commensurate with those of non-minority workers. If experience proves otherwise, the District Court will then have more than sufficient grounds for including the employers within the scope of the remedial decree.

To the extent that the remedy properly imposed upon the Union and the JATC requires any adjustment in the collective bargaining contract between petitioners and the Union, it is entirely appropriate for the District Court to fashion its injunctive remedy to so provide, and to have that remedy run against petitioners as well as the Union and the JATC. But the injunctive decree entered by the District Court as presently drawn treats petitioners as if they had been properly found liable for the Union's discrimination. A decree containing such provisions, we hold, is beyond the traditional equitable limitations upon the authority of a federal court to formulate such decrees.

Nor does the All Writs Act, 28 U. S. C. § 1651(a), support the extensive liability imposed upon petitioners by the District Court. The District Court did not rely upon this Act, and we think it completely wide of the mark in justifying the relief granted by the District Court. That Act was most recently considered by this Court in *United States* v. *New York Telephone Co.*, 434 U. S. 159 (1977), where we said: "This Court has repeatedly recognized the power of a federal court to issue such commands under the All Writs Act as may be necessary or appropriate to effectuate and prevent the frustration of orders it has previously issued in its exercise of jurisdiction otherwise obtained. . . ." In *New York Telephone, supra*, we held that the All Writs Act was available to require a third party to assist in the carrying out of a district court order pertaining to the installation of pen registers, and in doing so we noted that "[t]he order provided that the Company be fully reimbursed at prevailing rates, and compliance with it required minimal effort on the part of the Company and no disruption to its operations." *Id.*, at 175.

An examination of our cases which have relied on the All Writs Act convinces us that respondents are simply barking up the wrong tree when they seek to support the injunctive order of the District Court against petitioners on the basis of the provisions of that Act. There was no need for the District Court to treat petitioners as strangers to this law suit, and therefore to rely upon some extraordinary form of process or writ to bring them before the court. Petitioners had been named as defendants by respondents in their complaint, and they litigated the injunctive liability phase of the action before the District Court. Petitioners were parties to the action in every sense of the word, and subject to the jurisdiction of the District Court both as to the imposition of liability and as to the framing of a remedial decree. The difficulty faced by respondents in supporting the decree of the District Court insofar as it grants affirmative relief and requires payment toward the cost of implementing the decree is not that petitioners would otherwise be strangers to the action. The difficulty lies instead with the fact that on the record before the District Court the petitioners could not properly be held liable to any sort of injunctive relief based on their own conduct.

Thus insofar as respondents' arguments for the imposition of remedial obligations upon petitioners rests upon the assumption that petitioners were properly found liable for the violation of respondents' rights to be free from discrimination, that assumption can no longer stand in view of the conclusions previously set forth in this opinion. Insofar as respondents' assertions are based on some authority of the District Court to impose the sort of obligations which it did upon petitioners even though petitioners could not be held liabile on the record before the District Court, we hold that such obligations can be imposed neither under traditional equitable authority of the District Court nor under the All Writs Act.[22]

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[22] Petitioners have raised several objections to the District Court's certification of a defendant class. In light of our disposition, however, we find it unnecessary to reach these issues. It is evident from the District Court's opinion that certification of the defendant class was premised on

The judgment of the Court of Appeals is reversed and the case is remanded for proceedings consistent with this opinion.

It is so ordered.

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theories of liability that made individualized questions irrelevant. See note 5, *supra*. We have now rejected those theories, and we assume that the District Court will reconsider the issue of class certification in the event of a new trial to determine liability.

Petitioners have also questioned the standing of respondent Commonwealth of Pennsylvania to act either on its own behalf or as *parens patriae* in this litigation. We need not reach this issue either. Petitioners have not challenged the standing of the other plaintiffs and, therefore, even if Pennsylvania lacks standing, the District Court possessed Art. III jurisdiction to entertain those common issues presented by all plaintiffs. See *Watt* v. *Energy Action Educational Foundation*, 454 U. S. ——, —— (1981); *Arlington Heights* v. *Metropolitan Housing Dev. Corp.* 429 U. S. 252, 264, n. 9 (1977). Petitioners note that Pennsylvania has sought attorney's fees in its own right, but our judgment has removed the basis for such an award against petitioners until such time as Pennsylvania can again assert status as a prevailing party. Until Pennsylvania obtains relief different from that sought by plaintiffs whose standing has not been questioned, we decline to address the Commonwealth's standing.

SUPREME COURT OF THE UNITED STATES

Nos. 81-280, 81-330, 81-331, 81-332 AND 81-333

GENERAL BUILDING CONTRACTORS ASSOCIATION, INC., PETITIONER
81-280 *v.*
PENNSYLVANIA ET AL.

UNITED ENGINEERS & CONSTRUCTORS, INC., PETITIONER
81-330 *v.*
PENNSYLVANIA ET AL.

CONTRACTORS ASSOCIATION OF EASTERN PENNSYLVANIA AND UNITED CONTRACTORS ASSOCIATION, PETITIONERS
81-331 *v.*
PENNSYLVANIA ET AL.

GLASGOW, INC., PETITIONER
81-332 *v.*
PENNSYLVANIA ET AL.

BECHTEL POWER CORPORATION, PETITIONER
81-333 *v.*
PENNSYLVANIA ET AL.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

[June 29, 1982]

JUSTICE O'CONNOR, with whom JUSTICE BLACKMUN joins, concurring.

I concur in the Court's opinion today holding that a cause of action based on 42 U. S. C. § 1981 requires proof of intent to discriminate, that the employers cannot be held vicariously liable for the discrimination practiced by Local 542, and that § 1981 does not impose a "nondelegable duty" on the employers to insure that there is no discrimination in the Union's selection of the workforce. I write separately, however, in order to state expressly one of the options open to the District Court on remand, and to elaborate on the Court's comments regarding the scope of the federal courts' equitable power to afford full relief.

I

In determining that the petitioners cannot be held vicariously liable for the discriminatory conduct of the JATC, the Court is careful to note that its holding is based on the failure of the trial court to make "findings regarding the relationship between the JATC and petitioners . . . that might support application of *respondeat superior*." *Ante*, at 19.[1] In particular, because the record contains no findings regarding whether the employers maintain some control over the activities of the JATC, either through the employer-appointed trustees or through other means, the doctrine of *respondeat superior* is simply inapplicable.

I would briefly note the limits of the Court's holding. Once this case has been remanded to the District Court, nothing in the Court's opinion prevents the respondents from litigating the question of the employers' liability under § 1981 by attempting to prove the traditional elements of *respondeat superior*.

II

Regarding the scope of a federal court's equitable powers to afford full relief, I agree with the Court's holding that "a party not subject to liability for violating the law [may not] be assessed a proportionate share of the costs of implementing a decree to assure nondiscriminatory practices on the part of another party which *was* properly enjoined." *Ante*, at 22–23.[2] I also agree with the Court's ancillary holding that the District Court may not require quarterly reports from the employers detailing their compliance with the court's ill-founded injunction. Of course, since the employers are not liable for general injunctive relief, such reports are unnecessary.

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[1] The only facts offered by the respondents supporting application of *respondeat superior* are that half of the trustees administering the JATC are appointed by the employer associations, and that the JATC is funded entirely by mandatory employer contributions.

Under the appropriate circumstances, however, I believe other reports properly could be required of the employers, for example, to aid the court by charting the changes resulting from the injunction imposed on the Union and the JATC. Quite recently, in *Zipes* v. *Trans World Airlines, Inc.*, 455 U. S. —— (1982), this Court held that § 706(g) of Title VII authorizes a federal court to order retroactive seniority relief over the objections of a union that was not guilty of discrimination. The Court stated that:

> "*Teamsters* v. *United States*, 431 U. S. 324 (1977), . . . makes it clear that once there has been a finding of discrimination by the employer, an award of retroactive seniority is appropriate even if there is no finding that the union has also illegally discriminated. In *Teamsters*, the parties agreed to a decree which provided that the District Court would decide 'whether any discriminatees should be awarded additional equitable relief such as retroactive seniority.' 431 U. S., at 331, n. 4. Although we held that the union had not violated Title VII by agreeing to and maintaining the seniority system, we nonetheless directed the union to remain in the litigation

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[2] In the present case, the District Court ordered the three employer associations to pay 10% of the costs of remedial relief, and the employer, Glasgow, to pay 5%. Because the cost of relief to date has been approximately $200,000, the petitioners' share of the cost has been $70,000.

> as a defendant so that full relief could be awarded the victims of the employer's post-act discrimination. 431 U. S., at 356, n. 43." *Id.*, at ——.[3]

As the Court acknowledges today, it is entirely possible that full relief cannot be granted without subjecting the petitioners to some incidental or ancillary provisions of the court's injunctive order. It is thus conceivable, for example, that quarterly reports providing employment statistics necessary for the court to ascertain whether its injunctive decree is being properly implemented could be ordered under the court's equitable powers to effectuate its decree.

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[3] In support of this statement, the Court in *Teamsters* cited Rule 19(a) of the Fed. Rule Civ. Proc., which requires a district court to join a person as a party if "in his absence complete relief cannot be accorded among those already parties."

SUPREME COURT OF THE UNITED STATES

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BECHTEL POWER CORPORATION, PETITIONER
81-333 *v.*
PENNSYLVANIA ET AL.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

[June 29, 1982]

JUSTICE STEVENS, concurring in part and concurring in the judgment.

As I noted in my separate opinion in *Runyon* v. *McCrary*, 427 U. S. 160, 189, the Congress that enacted § 1 of the Civil Rights Act of 1866 "intended only to guarantee all citizens the same legal capacity to make and enforce contracts, to obtain, own, and convey property, and to litigate and give evidence." Any violation of that guarantee—whether deliberate, negligent, or purely accidental—would, in my opinion, violate 42 U. S. C. § 1981. The statute itself contains no requirement that an intent to discriminate must be proved.

The Court has broadened the coverage of § 1981 far beyond the scope actually intended by its authors; in essence, the Court has converted a statutory guarantee of equal rights into a grant of equal opportunities. See *Jones* v. *Alfred H. Mayer Co.*, 392 U. S. 409; *Runyon* v. *McCrary*, *supra.* Whether or not those decisions faithfully reflect the intent of Congress, the enlarged coverage of the statute "is now an important part of the fabric of our law." *Runyon*, *supra*, at 190 (STEVENS, J., concurring).

Since I do not believe Congress intended § 1981 to have any application at all in the area of employment discrimination generally covered by Title VII of the Civil Rights Act of 1964, an analysis of the motives and intent of the Reconstruction Congress cannot be expected to tell us whether proof of intentional discrimination should be required in the judicially-created portion of the statute's coverage. Since Congress required no such proof in the statute it actually enacted, a logician would be comfortable in concluding that no such proof should ever be required. Nevertheless, since that requirement tends to define the entire coverage of § 1981 in a way that better reflects the basic intent of Congress than would a contrary holding, I concur in the conclusion reached by the Court in Part II of its opinion insofar as it relates to the statutory protection of equal opportunity but, perhaps illogically, would reach a different conclusion in a case challenging a denial of a citizen's civil rights.

Accordingly, I join the Court's judgment and Parts III and IV of its opinion.

SUPREME COURT OF THE UNITED STATES

Nos. 81-280, 81-330, 81-331, 81-332 AND 81-333

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ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

[June 29, 1982]

JUSTICE MARSHALL, with whom JUSTICE BRENNAN joins, dissenting.

Today the Court reaches out and decides that 42 U. S. C.

§ 1981 requires proof of an intent to discriminate—an issue that is not at all necessary to the disposition of this case. Because I find no support for the majority's resolution of this issue, and because I disagree with its disposition of this case even if proof of intent should ordinarily be required, I respectfully dissent.

I

The question whether intent generally should be required in § 1981 actions is at most tangentially related to this case. There was unquestionably intentional discrimination on the part of both the union (Local 542) and the Joint Apprenticeship and Training Committee (JATC), a body, composed of officials from the union and the petitioner contracting associations, which jointly administered the apprenticeship and training program. As a result, the only question that the Court need address today is whether limited injunctive liability may be vicariously imposed upon an employer when the person or entity to whom it delegates a large portion of its hiring decisions intentionally discriminates on the basis of race. However, because the majority has chosen to reach first the more general question whether proof of intent is a prerequisite to recovery in a § 1981 action, I likewise will address this issue first.

Section 1981 provides in unqualified terms:

> "All persons within the jurisdiction of the United States *shall have the same right* in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens. . . ." 42 U. S. C. § 1981.

The plain language does not contain or suggest an intent requirement. A violation of § 1981 is not expressly conditioned on the motivation or intent of any person. The language focuses on the effects of discrimination on the protected class, and not on the intent of the person engaging in discriminatory conduct. Nothing in the statutory language implies that a right denied because of sheer insensitivity, or a pattern of conduct that disproportionately burdens the protected class of persons, is entitled to any less protection than one denied because of racial animus.

The Court attaches no significance to the broad and unqualified language of § 1981. Furthermore, the majority finds no support for its conclusion that intent should be required in the legislative history to § 1 of the 1866 Act, the precursor to § 1981. Instead, in the face of this unqualified language and the broad remedial purpose § 1981 was intended to serve, the majority assumes that Congress intended to restrict the scope of the statute to those situations in which racial animus can be proved on the ground that the legislative history contains no "convincing evidence" to the contrary. *Ante*, at 15. In my view, this approach to statutory construction is not only unsound, it is also contrary to our prior decisions, which have consistently given § 1981 as broad an interpretation as its language permits. See, *e. g.*, *McDonald* v. *Santa Fe Trail Trans. Co.*, 427 U. S. 273 (1976); *Runyon* v. *McCrary*, 427 U. S. 160 (1976); *Johnson* v. *Ry Express Agency*, 421 U. S. 454 (1975); *Tillman* v. *Wheaton-Haven Rec. Assn*, 410 U. S. 431 (1973); *Sullivan* v. *Little Hunting Park*, 396 U. S. 229 (1969); *Jones* v. *Alfred H. Mayer Co.*, 392 U. S. 409 (1968).

The fallacy in the Court's approach is that, in construing § 1981 and its legislative history, the Court virtually ignores Congress' broad remedial purposes and our paramount national policy of eradicating racial discrimination and its pernicious effects. When viewed in this light, it is clear that proof of intentional discrimination should not be required in order to find a violation of § 1981.

Although the Thirty-ninth Congress that passed the Civil Rights Act of 1866 did not specifically address the question whether intent should be required, the conclusion is inescapable that the congressional leadership intended to effectuate "the *result* of a change from a centuries old social system based on involuntary labor, with all the notions of racial unsuitability for the performance of anything but menial labor under close supervision, to the free labor system." *Croker* v. *Boeing Co.*, 662 F. 2d 975, 1006 (CA3 1981) (Gibbons, J., with whom Higginbotham and Sloviter, JJ., joined, dissenting in part) (emphasis in original). When this Congress convened, the Thirteenth Amendment had been ratified, abolishing slavery as a legal status. However, it was clear that in reality, Negroes were hardly accorded the employment and other opportunities accorded white persons generally. Thus, this Congress undertook to provide *in fact* the rights and privileges that were available to Negroes in theory. See generally tenBroek, The AntiSlavery Origins of the Fourteenth Amendment 156–180 (1951) (discussing the intent of the Thirty-ninth Congress to ensure to Negroes the *practical* freedom and equality which was already present at law, to reach private, not merely governmental conduct, and to provide affirmative obligations on the government to protect Negroes from unequal treatment). Four separate but related measures were proposed in an effort to accomplish this purpose.[1]

In this general climate, the 1866 Civil Rights Act was not an isolated technical statute dealing with only a narrow subject. Instead, it was an integral part of a broad congressional scheme intended to work a major revolution in the prevailing social order.[2] It is inconceivable that the Congress which enacted this statute would permit this purpose to be thwarted by excluding from the statute private action that concededly creates serious obstacles to the pursuit of job opportunities by Negroes solely because the aggrieved persons could not prove that the actors deliberately intended such a result. Even less conceivable is the notion, embraced by the Court's opinion today, that this Congress intended to absolve employers from even injunctive liability imposed as a result of intentional discrimination practiced by the persons to whom they had delegated their authority to hire employees. See *infra*, at 9–13.

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[1] These measures included the Civil Rights Act of 1866, passed over President Johnson's veto; the Freedman's Bureau bill, which would have created a federal agency to ensure that a free labor system in which Negroes had equal participation would *in fact* be accomplished, and which commanded a clear majority in Congress, but failed to pass over a presidential veto; a constitutional amendment sponsored by Representative Bingham but not recommended; and the Fourteenth Amendment.

[2] As the majority recognizes, *ante*, at 10–11, one of the principal changes Congress hoped to achieve was the elimination of the infamous Black Codes. These included state laws regulating the terms and condi-

The legislative history demonstrates that the Thirty-ninth Congress intended not merely to provide a remedy for preexisting rights, but to eradicate the "badges of slavery" that remained after the Civil War and the enactment of the Thirteenth Amendment. Congress was acutely aware of the difficulties that federal officials had encountered in effectuating the change from the system of slavery to a system of free labor even though the legal and constitutional groundwork for this change had already been laid. In the report that

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tions of employment. In many States, these oppressive laws were facially neutral, literally applying to all laborers without regard to race. The laws prohibited such conduct as refusing to perform work and disobeying an employer, or inducing an employee away from his employer, and many provided for forfeiture of wages if the employee did not fulfill the terms of his employment contract. Other Codes included vagrancy laws, which were vague and broad enough to encompass virtually all Negro adults, and many were facially neutral, applying to white persons as well as to Negroes. See *Croker* v. *Boeing Co.*, 662 F. 2d 975, 1004 n. 5 (CA3 1981) (dissenting opinon of Gibbons, J.) (citing E. McPherson, Political History of the United States During the Period of Reconstruction 30–44 (1871)). The Black Codes were constantly discussed during the debates over the Civil Rights Act of 1866, and Congress clearly intended that the Act would eliminate even those Codes which were facially neutral. See, *e. g.*, Cong. Globe, 39th Cong., 1st Sess. 39–41, 118–125 (1865); *id.*, at 1151–1160, 1838–1839 (1866). See also *University of California Regents* v. *Bakke*, 438 U. S. 265, 390–391 (separate opinion of MARSHALL, J.).

formed the working paper for the Joint Committee on Reconstruction and was of central importance to the deliberations of the Thirty-ninth Congress, General Schurz noted:

> "That the result of the free labor experiment made under circumstances so extremely unfavorable should at once be a perfect success, no reasonable person would expect. Nevertheless, a large majority of the southern men with whom I came into contact announced their opinions with so positive an assurance as to produce the impression that their minds were fully made up. In at least nineteen cases of twenty the reply I received to my inquiry about their views on the new system was uniformly this: 'You cannot make the negro work without physical compulsion.' I heard this hundreds of times, heard it wherever I went, heard it in nearly the same words from so many different persons, that at last I came to the conclusion that this is the prevailing sentiment among the southern people. There are exceptions to the rule, but as far as my information extends, far from enough to affect the rule. In the accompanying documents you will find an abundance of proof in support of this statement. There is hardly a paper relative to the negro question annexed to this report which does not, in some direct or indirect way, corroborate it." Sen. Exec. Doc. No. 2, 39th Cong., 1st Sess. (1865), *reprinted in* The Reconstruction Amendments' Debates 88 (Va. Comm'n Con. Gov't 1967).

Fully aware of this prevailing attitude, the leaders of Congress set about to enact legislation that would ensure to Negroes the opportunity to participate equally in the free labor system by providing an instrument by which they could strike down barriers to their participation, whether those barriers were erected with the conscious intent to exclude or with callous indifference to exclusionary effects. Congress knew that this attitude could manifest itself in a number of different ways and intended to protect Negro workers against not only flagrant, intentional discrimination, but also against more subtle forms of discrimination which might successfully camouflage the intent to oppress through facially neutral policies. Congressional awareness of the potential role that facially neutral measures might play in impeding the ability of Negroes to enjoy equal job opportunities is also reflected in the working paper which formed the basis for the 1866 Act. Addressing this problem, General Schurz stated:

> "What particular shape the reactionary movement will assume it is at present unnecessary to inquire. There are a hundred ways of framing apprenticeship, vagrancy, or contract laws, which will serve the purpose. . . ." *Id.*, at 92.

Unfortunately, this awareness seems utterly lacking in the Court's opinion today. In order to hold that § 1981 requires a showing of intent, the majority must assume that the rights guaranteed under § 1981—to make and enforce contracts on the same basis as white persons—can be adequately protected by limiting the statute to cases where the aggrieved person can prove intentional discrimination. In taking this extraordinarily naive view, the Court shuts its eyes to reality, ignoring the manner in which racial discrimination most often infects our society. Today, although flagrant examples of intentional discrimination still exist, discrimination more often occurs "on a more sophisticated and subtle level," the effects of which are often as cruel and "devastating as the most crude form of discrimination." *Pennsylvania* v. *Local 542, Int'l Union of Operating Engineers*, 469 F. Supp. 329, 337 (ED Pa. 1978) (Higginbotham, Circuit J., sitting by designation).[3] I think that Judge Higginbotham most accurately recognized this problem when he noted that "[t]he facts of the instant case . . . demonstrate the complexity and subtlety of the interrelationship of race, collective bargaining, craft unions, the employment process and that ultimate goal—real jobs." *Ibid.* He further noted that "[a]t the critical level of viable jobs and equal opportunitites, there were intentional and persistent efforts to exclude and discourage most of the minorities who, but for their race, would have been considered for entry into the union and for the more lucrative jobs." *Ibid.*

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[3] When discussing the scope of the Fifteenth Amendment in 1939, Justice Frankfurter was sensitive to the subtle forms that racial discrimination often takes. Writing for the Court in *Lane* v. *Wilson*, 307 U. S. 268,

Racial discrimination in all areas, and particularly in the areas of education and employment, is a devastating and reprehensible policy that must be vigilantly pursued and eliminated from our society:

> "Racial discrimination can be the most virulent of strains that infect a society, and the illness in any society so infected can be quantified. Exposure to embarrassment, humiliation, and the denial of basic respect can and does cause psychological and physiological trauma to its victims. This disease must be recognized and vigorously eliminated wherever it occurs. But racial discrimination takes its most malevolent form when it occurs in employment, for prejudice here not only has an immediate economic effect, it has a fulminating integrant that perpetuates the pestilences of degraded housing, unsatisfactory neighborhood amenities, and unequal education." *Croker* v. *Boeing Co.*, 662 F. 2d 975, 1002 (CA3 1981) (Aldisert, J., with whom Higgibotham, J. joined, dissenting in part).

The purposes behind § 1981, and the profound national policy of blotting out all vestiges of racial discrimination, are no less frustrated when equal opportunities are denied through clev-

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275 (1939), he stated: "The Amendment nullifies sophisticated as well as simple-minded modes of discrimination." Unfortunately, the Court no longer seems sensitive to this reality.

erly masked or merely insensitive practices, where proof of actual intent is nearly impossible to obtain, than when instances of intentional discrimination escape unremedied. For this reason, I cannot accept the Court's glib and unrealistic view that requiring proof of intent in § 1981 actions does not frustrate that statute's purpose of protecting against the devastating effects of racial discrimination in employment.

II

Even if I agreed with the Court that intent must be proved in a § 1981 action, I could not agree with its conclusion that the petitioner contracting associations should be immunized, even from injunctive liability, for the intentional discrimination practiced by the union hall to which they delegated a major portion of their hiring decisions. Under § 1981, minorities have an unqualified right to enter into employment contracts on the same basis as white persons. It is undisputed that in this case, the respondent class was denied this right through intentional discrimination. The fact that the associations chose to delegate a large part of the hiring process to the local union hiring hall, which then engaged in intentional discrimination, does not alter the fact that respondents were denied the right to enter into employment contracts with the associations on the same basis as white persons.

At the very least, § 1981 imposes on employers the obligation to make employment decisions free from racial considerations. The hiring decisions made by the contracting associations in this case were fraught with racial discrimination. Solely because of their race, hundreds of minority operating engineers were totally excluded from the industry and could not enter into employment contracts with any employer. Those minorities allowed into the industry suffered discrimination in referrals, and thus they too were denied the same right as white persons to contract with the contracting associations. Not one of the petitioner contracting associations has ever claimed, nor could they, that minorities had the same right as white operating engineers to contract for employment.

Instead, the contracting associations attempt to hide behind the veil of ignorance, shifting their responsibility under § 1981 to the very entity which they chose to assist them in making hiring decisions.[4] The suggestion that an employer's responsibility under § 1981 depends upon its own choice of a hiring agent finds no support in the statute, nor does any other source of law authorize the circumvention of § 1981 that the contracting associations seek here. Their obligation to make employment contracts free from racial discrimination is a nondelegable one—it does not disappear when, as is often the case, the actual employer designates a particular agent to assist in the hiring process. In my view, the fact that the discriminating entity here is a union hiring hall, and not a person or corporation which has a traditional agent-principal relationship with the employer, does not alter this analysis. Cf. *Morrison-Knudsen Co.* v. *NLRB*, 275 F. 2d 914 (CA2 1960) (Per Swan, J.) (employer cannot escape liability for discrimination against nonunion members by the union hiring hall to which it turns over the task of supplying men for employment), cert. denied, 366 U. S. 909 (1961).

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[4] Although the District Court held that respondents had not proved that the contracting associations as a class had actual knowlege or had specifically approved of the intentional discrimination, it hardly found them totally blameless in this regard, and it found that the petitioner associations in particular were not innocent. One part of the proof of intentional discrimination by the hiring hall was the fact that Local 542 had intentionally overstated its percentage of minority members to the Federal Government in order to receive federal funds while maintaining an extraordinarily low actual minority percentage. With respect to the petitioner contracting associations, the District Court found:

"Any argument that, because the union alone had primary access to the membership data, the [petitioner] contracting associations . . . were not at least reckless participants in this scheme, I find to be devoid of merit and patently incredible. . . . The prospect of deriving . . . an immediate and substantial financial benefit from the federal coffers allowed them to become willing parties to the scheme by capriciously certifying 'facts' in anticipation of the government's reliance on them: Having sought to enrich their members with substantial profits, it is now too late to cry innocence and cast the blame elsewhere. These were no innocent prognasticators who were misled by the union's scheme to give inacurate information." *Pennsylvania* v. *Local 542, Int'l Union of Operating Engineers*, 469 F. Supp. 329, 345 (ED Pa. 1978).

The District Court further found:

"The fact is that the vast majority of individual contractors *never hired* a minority operating engineer; that the [petitioner associations] signed a statement, relevant to federal approval of the "Affirmative Action Program" . . ., grossly exaggerating union membership; and that the gross disparity between the percentage of the minority representation in the labor pool and minority representation in the union along with a gross disparity in hours and wages of minorities as against the minority labor pool percentage is a matter of such broad scope that some or all of the contractors and associations might have had knowlege of it." *Id.*, at 401 (emphasis added).

The majority does not really analyze the question whether petitioners should be held injunctively liable because § 1981 imposes upon them a nondelegable duty. Instead the majority argues that, because it has held that § 1981 is intended only to reach intentional discrimination, the statute cannot make employers "guarantors of the workers' rights as against third parties who would infringe them." *Ante*, at 21. This argument does not withstand analysis. The majority does not assert that employers may escape liability under § 1981 by delegating their hiring decisions to a third party agent. Indeed, in light of the importance attached to the rights § 1981 is intended to safeguard, the duty to abide by this statute must be nondelegable, as the majority apparently recognizes. *Ante*, at 20. Instead, the majority argues that because § 1981 imposes only the duty to refrain from intentional discrimination in hiring, it somehow automatically follows that this duty could not have been violated in this case. However, it was precisely this duty that was violated here. The District Court found, and this Court does not disagree, that the entity to whom the petitioner associations effectively delegated their hiring decisions *intentionally discriminated* against the respondent class on the basis of race in making these decisions. Even under the Court's own narrow view of the scope of the duty imposed by § 1981, then, the duty was unquestionably violated in this case.

The majority obfuscates the issue by suggesting that the District Court imposed upon the contracting associations an obligation to seek out and eliminate discrimination by unrelated third parties wherever it may occur. In reality, the District Court did nothing more than impose limited injunctive liability upon the associations for violating their nondelegable duty under § 1981 when the union hiring hall, which effectively made hiring decisions for the associations, engaged in intentional discrimination on the basis of race in making these decisions.

By immunizing the employer from the injunctive relief necessary to remedy the intentional discrimination practiced by those through whom the employer makes its hiring decisions, the Court removes the person most necessary to accord full relief—the entity with whom the aggrieved persons will ultimately make a contract. I believe that the District Court appropriately rejected the petitioners' argument when it explained: "With intensity some employers urge that they agreed to the exclusive hiring hall system solely as a matter of economic survival at the end of a destructive ten week strike when the union would not compromise for any other hiring alternative. Yet economic pressures, however strong and harmful they might be, do not create immunity for employers, at least not in [the injunctive] liability phase." 469 F. Supp., at 338.

Section 1981 provides Negroes "the same right" to make contracts as white persons enjoy. In the present case, this unqualified right was violated, and the violation is made no more palatable because the persons who actually made the hiring decisions and referrals, and not the employer itself, engaged in intentional discrimination.[5] The devastating violation of their rights under § 1981 remains the same and will go at least partially unremedied when the person with whom the ultimate employment contract must be made is immunized from even injunctive relief. I cannot impute to the Congress which enacted § 1981 the intention to reach such an inequitable and nonsensical result. Accordingly, I must dissent.

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[5] I agree with the JUSTICE O'CONNOR's observation that nothing in the

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Court's opinion prevents the District Court on remand from holding the petitioner associations liable for discrimination practiced by the JATC. Specifically, they may be held liable because the trustees administering the JATC are appointed by the petitioner associations, the JATC is funded by employer contributions, and the associations exercise control over the JATC's actions. I also agree with JUSTICE O'CONNOR that the Court's opinion does not prevent the District Court from requiring petitioners to comply with incidental or ancillary provisions contained in its injunctive order.

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SUPREME COURT OF THE UNITED STATES

Syllabus

FORD MOTOR CO. *v.* EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 81-300. Argued April 20, 1982—Decided June 28, 1982

Held: An employer charged with discrimination in hiring under Title VII of the Civil Rights Act of 1964 can toll the continuing accrual of backpay liability under § 706(g) of Title VII by unconditionally offering the claimant the job previously denied, and is not required to offer seniority retroactive to the date of the alleged discrimination. Thus, absent special circumstances, the rejection of an employer's unconditional job offer ends the accrual of potential backpay liability. Pp. 5–20.

(a) This rule serves Title VII's objective of ending discrimination through voluntary compliance, for it gives the employer a strong incentive to hire the claimant. To require a retroactive seniority offer in addition to the unconditional job offer fails to provide the same incentive, because it makes hiring the claimant more costly than hiring another applicant for the same job. Pp. 7–9.

(b) An unemployed or underemployed claimant's statutory obligation to minimize damages under § 706(g) requires him to accept an unconditional job offer, even without retroactive seniority. The rule announced here merely embodies such requirement of minimizing damages, without affecting the claimant's right to compensation. Pp. 9–13.

(c) The rule announced here also is consistent with the policy of full compensation when the claimant has had the good fortune to find a more attractive job than that offered by the employer charged with discrimination, because the availability of the better job terminates the ongoing ill effect of the latter's refusal to hire the claimant. Pp. 13–15.

(d) Since the rule announced here rests both on the statutory requirement that a claimant minimize damages and on the fact that he no longer incurs additional injury if he has been able to find other work at least as attractive as the charged employer's, the rule in almost all circumstances

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is consistent with Title VII's object of making injured claimants whole. Pp. 15–18.

(e) To require a retroactive seniority offer in addition to the unconditional job offer would threaten the interests of innocent incumbent employees by disrupting the established seniority hierarchy, with the attendant risk that an innocent employee would be unfairly laid off or disadvantaged because a Title VII claimant has been granted seniority. Pp. 18–19.

645 F. 2d 183, reversed and remanded.

O'CONNOR, J., delivered the opinion of the Court, in which BURGER, C. J., and WHITE, POWELL, REHNQUIST, and STEVENS, JJ., joined. BLACKMUN, J., filed a dissenting opinion, in which BRENNAN and MARSHALL, JJ., joined.

NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D.C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

SUPREME COURT OF THE UNITED STATES

No. 81-300

FORD MOTOR COMPANY, PETITIONER *v.* EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

[June 28, 1982]

JUSTICE O'CONNOR delivered the opinion of the Court.

This case presents the question whether an employer charged with discrimination in hiring can toll the continuing accrual of backpay liability under § 706(g) of Title VII, 42 U. S. C. § 2000e-5(g), simply by unconditionally offering the claimant the job previously denied, or whether the employer also must offer seniority retroactive to the date of the alleged discrimination.[1]

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[1] The dissent asserts that by so "fram[ing] the question presented" we have "simply and completely misstate[d] the issue." *Post*, at 2. Apparently, neither party agrees with the dissent. The petitioner summarizes the question presented as "whether back pay due an employment discrimination claimant continues to accrue after the claimant has rejected an unconditional job offer that does not include retroactive seniority or back pay." Brief for Petitioner i. The respondent sums up the question presented as "[w]hether an employer who unlawfully refused to hire job applicants because they were women can terminate its liability for back pay by subsequently offering the applicants positions without seniority at a time when they had obtained, and accumulated seniority in, other jobs." Brief for Respondent i.

To buttress the assertion that the Court has addressed a question not presented, the dissent claims that we have "misrea[d]" the Court of Appeals' decision, "transform[ing] a narrow Court of Appeals ruling into a broad one, just so [we could] reverse and install a broad new rule of [our] own choosing," *post*, at 9, n. 8, rather than attempt, as best we are able, to

The question has considerable practical significance because of the lengthy delays that too often attend Title VII litigation.[2] The extended time it frequently takes to obtain satisfaction in the courts may force a discrimination claimant to suffer through years of underemployment or unemployment before being awarded the job the claimant deserves. Court delays, of course, affect all litigants. But for the victim of job discrimination, delay is especially unfortunate. The claimant cannot afford to stand aside while the wheels of justice grind slowly toward the ultimate resolution of the lawsuit. The claimant needs work that will feed a family and restore self-respect. A job is needed—now. In this case, therefore, we must determine how best to fashion the remedies available under Title VII to fulfill this basic need.

I

A

In June and July 1971 Judy Gaddis, Rebecca Starr, and Zettie Smith applied at a Ford Motor Company (Ford) parts warehouse located in Charlotte, North Carolina, for jobs as "picker-packers," "picking" ordered parts from storage, and "packing" them for shipment. At the time, no woman had ever worked in that capacity at the Ford warehouse. All three women were qualified for the positions: Gaddis and Starr recently had been laid off from equivalent jobs at a nearby General Motors (GM) warehouse, and Smith had comparable prior experience. Smith applied before any of the openings were filled, and Gaddis and Starr applied while at least two positions remained available.[3] Ford, however,

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decide the particular case actually before us. Because we believe we have correctly and fairly framed the question, we decline the opportunity to address further this *ad hominem* argument.

[2] The discriminatory refusals to hire involved in this case occurred 11 years ago.

[3] When this case came to trial, Ford claimed that Gaddis and Starr ap-

filled the three vacant positions with men, and Gaddis filed a charge with the federal Equal Employment Opportunity Commission (EEOC), claiming that Ford had discriminated against her because of her sex.[4]

In January 1973, General Motors recalled Gaddis and Starr to their former positions at its warehouse. The following July, while they were still working at GM, a single vacancy opened up at Ford. Ford offered the job to Gaddis, without seniority retroactive to her 1971 application. Ford's offer, however, did not require Gaddis to abandon or compromise her Title VII claim against Ford. Gaddis did not accept the job, in part because she did not want to be the only woman working at the warehouse, and in part because she did not want to lose the seniority she had earned at General Motors. Ford then made the same unconditional offer to Starr, who declined for the same reasons. Gaddis and Starr continued to work at the General Motors warehouse, but in 1974 the warehouse was closed and they were laid off. They then unsuccessfully sought new employment until September 1975, when they entered a government training program for the unemployed.

Smith applied again for work at Ford in 1973, but was never hired. She worked elsewhere, though at lower wages than she would have earned at Ford, during much of the time between 1971 and the District Court's decision in 1977.

In contrast to Gaddis', Starr's, and Smith's difficulties, at least two of the three men hired by Ford in 1971 were still working at the warehouse at the time of the trial in 1977.

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plied after men had already been hired and that Smith had not applied at all. The District Court found to the contrary, however, and the Court of Appeals upheld the findings.

[4] After Gaddis had filed her complaint, she and Starr continued to seek work at the Ford warehouse. In November 1972, Ford hired them and four other workers for six weeks to fill temporary jobs at the warehouse.

B

In July 1975, the EEOC sued Ford in the United States District Court for the Western District of North Carolina, alleging that Ford had violated Title VII of the Civil Rights Act of 1964, 78 Stat. 253, as amended, 42 U. S. C. § 2000e *et seq.*, by refusing to hire women at the Charlotte warehouse. The Commission sought injunctive relief and backpay for the victims.[5]

After trial, the District Court found that Ford had discriminated against the three women on the basis of their sex and awarded them backpay in an amount equal to "the difference between the amount they would have earned had they been hired in August 1971, and the amounts actually earned or reasonably earnable by them" between that date and the date of the court's order. App. to Pet. for Cert. A–170. The District Court rejected Ford's contention that Gaddis and Starr were not entitled to backpay accruing after the dates on which they declined Ford's offer of employment. *Id.*, at A–170 to A–171.

The United States Court of Appeals for the Fourth Circuit affirmed the District Court's finding of unlawful discrimination, as well as the court's award to Gaddis and Starr of backpay that had accrued after July 1973, when the women rejected Ford's unconditional job offer. 645 F. 2d 183 (1981). The court suggested that, had Ford promised retroactive seniority with its job offer, the offer would have cut off Ford's backpay liability. The court concluded, however, that without the promise of retroactive seniority, Ford's 1973 offer was "incomplete and unacceptable." *Id.*, at 193.[6]

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[5] Although the EEOC suit involved additional issues and claimants, we are concerned here with only the part of the suit that involved Gaddis, Starr, and Smith.

[6] Senior District Judge Walter E. Hoffman, sitting by designation, dissented from this portion of the Court of Appeals' decision.

Ford then petitioned this Court for a writ of certiorari, contending, *inter alia*, that its unconditional job offer to Gaddis and Starr should have cut off the further accrual of backpay liability.[7] We granted the writ. 454 U. S. 1030 (1981).

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[7] In its petition Ford raised two other issues. First, Ford read the opinion of the Court of Appeals as suggesting that to toll backpay liability an employer must include with his job offer, not just retroactive seniority, but also an offer of already-accrued backpay. The Court of Appeals' opinion did not expressly so hold, however, and before this Court the EEOC concedes that under Title VII such an offer of a lump-sum payment of backpay is not required to toll the continuing accrual of backpay liability. This issue thus is no longer contested by the parties.

The second issue is the only one involving Smith. Ford disputed the District Court's finding that Ford discriminated against the three women, claiming that the court reached its conclusion because it erroneously allocated the burden of proof. We are persuaded, however, that the District Court's findings were consistent with *Texas Dept. of Community Affairs* v. *Burdine*, 450 U. S. 248 (1981).

In *McDonnell-Douglas Corp.* v. *Green*, 411 U. S. 792 (1973), we set forth the basic allocation of burdens and order of presentation of proof in a Title VII case alleging discriminatory treatment. See also *Furnco Construction Co.* v. *Waters*, 438 U. S. 567 (1978), and *Board of Trustees* v. *Sweeney*, 439 U. S. 24 (1978). Despite these decisions, some confusion continued to exist. In *Burdine* we reiterated that after a plaintiff has proved a prima facie case of discrimination, "the burden shifts to the defendant 'to articulate some legitimate, nondiscriminatory reason for the employee's rejection.'" *Id.*, at 253 (citation omitted). The "ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff." *Id.*, at 253 (citation omitted). It was then made clear that:

"The defendant need not persuade the Court that it was actually motivated by the proffered reasons. . . . It is sufficient if the defendant's evidence raises a genuine issue of fact as to whether it discriminated against the plaintiff." *Id.*, at 254–255.

As neither the District Court nor the Court of Appeals cited *Burdine* (apparently because it had only recently been decided), we restate the foregoing principles. We conclude, however, on the basis of the specific findings of fact by the District Court, undisturbed by the Court of Appeals, that the plaintiffs in this case carried their burden of persuasion.

II

Section 706(g) of the Civil Rights Act of 1964, 78 Stat. 261, as amended, 42 U. S. C. § 2000e–5(g), governs the award of backpay in Title VII cases. In pertinent part, § 706(g) provides that:

> "If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court *may* enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as *may* be appropriate, which *may* include, but is not limited to, . . . hiring of employees, *with or without* back pay, . . . or any other equitable relief as the court deems appropriate. . . . Interim earnings or amounts earnable with reasonable diligence by the per-

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As *Burdine* commands, the District Court did not place the burden of persuasion on Ford. Instead, it began its discussion of liability by straightforwardly declaring that the EEOC "ha[d] established that Ford discriminated against Smith, Gaddis and Starr on the basis of their sex." App. to Pet. for Cert. A–167. The court supported this conclusion by pointing, not only to the EEOC's proof of a prima facie case, but also to "its showing that Ford had never hired women into the warehouse until November, 1972, and that [its] procedures for hiring were vague and were based on highly subjective criteria." *Id.*, at A–167 to A–168. The court, moreover, entered findings of fact discrediting each of Ford's proffered justifications for refusing to hire the women. *Id.*, at A–155 to A–161. This progression of factual findings and legal conclusions indicates that the District Court found by a preponderance of the evidence that Ford's justifications were "unworthy of credence," 450 U. S., at 256, and that the company had discriminated on the basis of sex. These findings are fully consistent with *Burdine*.

As Ford points out, the Court of Appeals opinion contains some statements that are arguably inconsistent with *Burdine*. That court corrected any misimpression generated by these statements, however, with a discussion directly focusing on the burden-of-proof issue. 645 F. 2d, at 189, n. 5. In light of this discussion, and because it is clear that the trier of fact properly allocated the burden of proof, we find no merit in Ford's burden-of-proof argument.

> son or persons discriminated against *shall* operate to reduce the back pay otherwise allowable." (emphasis added).[8]

Under § 706(g), then, "backpay is not an automatic or mandatory remedy[,] . . . it is one which the courts 'may' invoke" in the exercise of their sound "discretion [which] is equitable in nature." *Albemarle Paper Co.* v. *Moody*, 422 U. S. 405, 415, 416 (1975). Nonetheless, while "the power to award backpay is a discretionary power," *id.*, at 447 (BLACKMUN, J., concurring in the judgment), a "court must exercise this power 'in light of the large objectives of the Act,'" and, in doing so, must be guided by "meaningful standards" enforced by "thorough appellate review." *Id.*, at 416 (opinion of the Court) (citations omitted). Moreover, as we emphasized in *Albemarle Paper*, in Title VII cases

> "such discretionary choices are not left to a court's 'inclination, but to its judgment; and its judgment is to be guided by sound legal principles.' *United States* v. *Burr*, 25 F. Cas. 30, 35 (No. 14,692d) (CC Va. 1807) (Marshall, C. J.). . . .
>
> "It is true that '[e]quity eschews mechanical rules * * *

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[8] Section 706(g) was "expressly modeled," *Albemarle Paper Co.* v. *Moody*, 422 U. S. 405, 419 & n. 11 (1975), on the analogous remedial provision of the National Labor Relations Act (NLRA), § 10(c), 49 Stat. 454, as amended, 29 U. S. C. § 160(c). Section 10(c) provides that, if an unfair labor practice has been, or is being, committed, the National Labor Relations Board (NLRB) is empowered to "take such affirmative action, including reinstatement of employees with or without back pay, as will effectuate the policies" of the Act.

The principles developed under the NLRA generally guide, but do not bind, courts in tailoring remedies under Title VII. See, *e. g.*, *International Brotherhood of Teamsters* v. *United States*, 431 U. S. 324, 366–367 (1977); *Franks* v. *Bowman Transportation Co.*, 424 U. S. 747, 768–770 (1976); *Albemarle Paper Co.*, *supra*, at 419 & n. 11. Therefore, throughout this opinion we refer to cases decided under the NLRA as well as under Title VII.

> [and] depends on flexibility.' *Holmberg* v. *Armbrecht*, 327 U.S. 392, 396 (1946). But when Congress invokes the Chancellor's conscience to further transcendent legislative purposes, what is required is the principled application of standards consistent with those purposes and not 'equity [which] varies like the Chancellor's foot.' Important national goals would be frustrated by a regime of discretion that 'produce[d] different results for breaches of duty in situations that cannot be differentiated in policy.' *Moragne* v. *States Marine Lines*, 398 U.S. 375, 405 (1970)." *Id.*, at 416–417.

In this case, Ford and the EEOC offer competing standards to govern backpay liability. Ford argues that if an employer unconditionally offers a claimant the job for which he previously applied, the claimant's rejection of that offer should toll the continuing accrual of backpay liability.[9] The EEOC, on the other hand, defends the lower court's rule,[10] contending that backpay liability should be tolled only by the rejection of an offer that includes seniority retroactive to the date on which the alleged discrimination occurred. Our task is to determine which of these standards better coincides with the "large objectives" of Title VII.

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[9] It should be clear that the contested backpay in this suit stems from the period following Ford's offer, and during which Gaddis and Starr were unemployed, *i. e.*, after the GM warehouse closed. Our decision today does not affect their right to claim backpay for the period before they rejected Ford's offers.

[10] For reasons of its own, the dissenting opinion reads the decision below narrowly and takes us to task for discerning the outlines of a "general rule" *post*, at 8 (emphasis deleted), in the opinion of the Court of Appeals. In this regard, we note that already at least one district court evidently not only has read the opinion below as prescribing a general rule, but in addition has interpreted that rule more broadly than we do. See *Saunders* v. *Hercules, Inc.*, 510 F. Supp. 1137, 1142 (WD Virginia 1981) ("in view of the recent Fourth Circuit Court of Appeals decision in *Equal Employment Opportunity Commission* v. *Ford Motor Company*, 645 F.2d 183 (4th Cir. 1981) . . . [i]t is clear . . . that a person who has been discriminated against does not have to accept an offer of reemployment where back pay has not been offered").

III

The "primary objective" of Title VII is to bring employment discrimination to an end, *Albemarle Paper*, *supra*, at 417, by "achiev[ing] equality of employment opportunities and remov[ing] barriers that have operated in the past to favor an identifiable group . . . over other employees." *Ibid.* (quoting *Griggs* v. *Duke Power Co.*, 401 U. S. 424, 429–430 (1971)). See also *McDonnell Douglas Corp.* v. *Green*, 411 U. S. 792, 800 (1973). "[T]he preferred means for achieving" this goal is through "[c]ooperation and voluntary compliance." *Alexander* v. *Gardner-Denver Co.*, 415 U. S. 36, 44 (1974).

To accomplish this objective, the legal rules fashioned to implement Title VII should be designed, consistent with other Title VII policies, to encourage Title VII defendants promptly to make curative, unconditional job offers to Title VII claimants, thereby bringing defendants into "voluntary compliance" and ending discrimination far more quickly than could litigation proceeding at its often ponderous pace. Delays in litigation unfortunately are now commonplace, forcing the victims of discrimination to suffer years of underemployment or unemployment before they can obtain a court order awarding them the jobs unlawfully denied them. In a better world, perhaps, law suits brought under Title VII would speed to judgment so quickly that the effects of legal rules on the behavior of the parties during the pendency of litigation would not be as important a consideration. We do not now live in such a world, however, as this case illustrates.

The rule tolling the further accrual of backpay liability if the defendant offers the claimant the job originally sought well serves the objective of ending discrimination through voluntary compliance, for it gives an employer a strong incentive to hire the Title VII claimant. While the claimant may be no more attractive than the other job applicants, a job offer to the claimant will free the employer of the threat of liability for further backpay damages. Since paying backpay damages is like paying an extra worker who never came to work, Ford's proposed rule gives the Title VII claimant a decided edge over other competitors for the job he seeks.

The rule adopted by the court below, on the other hand, fails to provide the same incentive, because it makes hiring the Title VII claimant more costly than hiring one of the other applicants for the same job. To give the claimant retroactive seniority before an adjudication of liability, the employer must be willing to pay the additional costs of the fringe benefits that come with the seniority that newly hired workers usually do not receive. More important, the employer must also be prepared to cope with the deterioration in morale, labor unrest, and reduced productivity that may be engendered by inserting the claimant into the seniority ladder over the heads of the incumbents who have earned their places through their work on the job. In many cases, moreover, disruption of the existing seniority system will violate a collective bargaining agreement, with all that such a violation entails for the employer's labor relations.[11] Under the rule adopted by the court below, the employer must be willing to accept all these additional costs if he hopes to toll his backpay liability by offering the job to the claimant. As a result, the employer will be less, rather than more, likely to hire the claimant.

In sum, the Court of Appeals' rule provides no incentive to employers to hire Title VII claimants. The rule advocated by Ford, by contrast, powerfully motivates employers to put Title VII claimants to work, thus ending ongoing discrimination as promptly as possible.[12]

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[11] See *American Tobacco Co.* v. *Patterson*, 456 U. S. —, — (1982) ("Seniority provisions are of 'overriding importance' in collective bargaining, . . . and they 'are universally included in these contracts'") (quoting *Humphrey* v. *Moore*, 375 U. S. 335, 346 (1964), and *Trans World Airlines, Inc.* v. *Hardison*, 432 U. S. 63, 79 (1977)).

[12] In his dissent, JUSTICE BLACKMUN suggests that it is we who speak

IV

Title VII's primary goal, of course, *is* to end discrimination; the victims of job discrimination want jobs, not lawsuits.[13] But when unlawful discrimination does occur, Title VII's secondary, fallback purpose is to compensate the victims for their injuries. To this end, § 706(g) aims "to make the victims of unlawful discrimination whole" by restoring them, "so far as possible . . . to a position where they would have been were it not for the unlawful discrimination." *Albemarle Paper, supra,* at 421 (quoting 118 Cong. Rec. 7168 (1972) (remarks of Sen. Williams)). We now turn to consider whether the rule urged by Ford not only better serves the goal of ending discrimination, but also properly compensates injured Title VII claimants.

A

If Gaddis and Starr had rejected an unconditional offer from Ford before they were recalled to their jobs at GM, tolling Ford's backpay liability from the time of Ford's offer plainly would be consistent with providing Gaddis and Starr full compensation for their injuries. An unemployed or un-

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from the "comfor[t]" of the "sidelines," *post,* at 15, somewhere outside "the real world," *post,* at 16, of sex discrimination. For all the dissent's rhetoric, however, nowhere does the dissent seriously challenge our conclusion that the rule we adopt will powerfully motivate employers to offer Title VII claimants the jobs they have been denied. But Rebecca Starr's trial testimony eloquently explains what claimants need: "I was just wanting that job so bad because you can't, a woman, when you've got three children, I needed the money, and I was wanting the job so bad." IV Tr. 356. Thus, it is the rule applied by the court below which manifests a "studied indifference to the real-life concerns," *post,* at 15, of the victims of sex discrimination.

[13] See 118 Cong. Rec. 7569 (remarks of Rep. Dent during debate on 1972 amendments to Title VII) ("Most people just want to work. That is all. They want an opportunity to work. We are trying to see that all of us, no matter of what race, sex, or religious or ethnic background, will have an equal opportunity in employment").

deremployed claimant, like all other Title VII claimants, is subject to the statutory duty to minimize damages set out in § 706(g).[14] This duty, rooted in an ancient principle of law,[15] requires the claimant to use reasonable diligence in finding other suitable employment. Although the un- or underemployed claimant need not go into another line of work, accept a demotion, or take a demeaning position,[16] he forfeits his right to backpay if he refuses a job substantially equivalent to the one he was denied.[17] Consequently, an employer charged with unlawful discrimination often can toll the accrual of backpay liability by unconditionally offering the claimant the job he sought, and thereby providing him with an opportunity to minimize damages.[18]

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[14] The provision expressly states that "[i]nterim earnings or amounts earnable with reasonable diligence by the person or persons discriminated against shall operate to reduce the back pay otherwise allowable." 42 U. S. C. § 2000e–5(g).

Claimants often take other lesser or dissimilar work during the pendency of their claims, even though doing so is not mandated by the statutory requirement that a claimant minimize damages or forfeit his right to compensation. See, *e. g.*, *Merriweather* v. *Hercules, Inc.*, 631 F. 2d 1161 (CA5 1980) (voluntary minimization of damages in dissimilar work); *Thornton* v. *East Texas Motor Freight*, 497 F. 2d 416, 422 (CA6 1974) (voluntary minimization of damages by moonlighting).

[15] See generally, *e. g.*, C. McCormick, Handbook on the Law of Damages 127–158 (1935). McCormick summarizes "the general rule" as follows: "Where one person has committed a tort, breach of contract, or other legal wrong against another, it is incumbent upon the latter to use such means as are reasonable under the circumstances to avoid or minimize the damages. The person wronged cannot recover for any item of damage which could thus have been avoided." *Id.*, at 127.

In connection with the remedial provisions of the NLRA, we said: "Making the workers whole for losses suffered on account of an unfair labor practice is part of the vindication of the public policy which the Board enforces. Since only actual losses should be made good, it seems fair that deductions should be made not only for actual earnings by the worker but also for losses which he willfully incurred." *Phelps Dodge Corp.* v. *NLRB*, 313 U. S. 177, 197–198 (1941).

[16] See, *e. g.*, *NLRB* v. *The Madison Courier, Inc.*, 153 U. S. App. D. C. 232, 245–246, 472 F. 2d 1307, 1320–21 (1972) (employee need not "seek employment which is not consonant with his particular skills, background, and experience" or "which involves conditions that are substantially more onerous than his previous position"); *Wonder Markets, Inc.*, 236 N. L. R. B. 787, 787 (1978) (offer of reinstatement ineffective when discharged employee offered a different job, though former position still existed), enforced *sub nom. NLRB* v. *Eastern Smelting & Refining Corp.*, 598 F. 2d

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An employer's unconditional offer of the job originally sought to an un- or underemployed claimant, moreover, need not be supplemented by an offer of retroactive seniority to be effective, lest a defendant's offer be irrationally disfavored relative to other employers' offers of substantially similar jobs. The claimant, after all, plainly would be required to minimize his damages by accepting another employer's offer even though it failed to grant the benefits of seniority not yet

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666, 676 (CA1 1979), supplemental decision, 249 N. L. R. B. 294 (1980); *Good Foods Manufacturing & Processing Corp.*, 195 N. L. R. B. 418, 419 (1972) (offer of reinstatement ineffective because job offered had different conditions of employment and benefits), supplemental decision, 200 N. L. R. B. 623 (1972), enforced, 492 F. 2d 1302 (CA7 1974); *Harvey Carlton*, 143 N. L. R. B. 295, 304 (1963) (offer of reinstatement ineffective because employees would return on probation).

Some lower courts have indicated, however, that after an extended period of time searching for work without success, a claimant must consider taking a lower-paying position. See, *e. g.*, *NLRB* v. *The Madison Courier, Inc.*, *supra*, at 245–246, 472 F. 2d, at 1320–1321; *NLRB* v. *Southern Silk Mills, Inc.*, 242 F. 2d 697, 700 (CA6), cert. denied, 355 U. S. 821 (1957). If the claimant decides to go into a dissimilar line of work, or to accept a demotion, his earnings must be deducted from any eventual backpay award. See § 706(g); *Merriweather* v. *Hercules, Inc.*, 631 F. 2d 1161, 1168 (CA5 1980); *Taylor* v. *Philips Industries, Inc.*, 593 F. 2d 783, 787 (CA7 1979) (*per curiam*).

[17] *NLRB* v. *Arduini Mfg. Corp.*, 394 F. 2d 420 (CA1 1968).

[18] The claimant's obligation to minimize damages in order to retain his right to compensation does not require him to settle his claim against the employer, in whole or in part. Thus, an applicant or discharged employee is not required to accept a job offered by the employer on the condition that his claims against the employer be compromised. See, *e. g.*, *NLRB* v. *St. Marys Sewer Pipe Co.*, 146 F. 2d 995, 996 (CA3 1945).

earned.[19] Of course, if the claimant fulfills the requirement that he minimize damages by accepting the defendant's unconditional offer, he remains entitled to full compensation if he wins his case.[20] A court may grant him backpay accrued prior to the effective date of the offer,[21] retroactive seniority,[22] and compensation for any losses suffered as a result of his lesser seniority before the court's judgment.[23]

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[19] For the same reasons, a defendant's job offer is effective to force minimization of damages by an un- or underemployed claimant even without a supplemental offer of backpay, since the claimant would be required to accept another employer's offer of a substantially similar job without a large front-end, lump-sum bonus. See, *e. g.*, *NLRB* v. *Midwest Hanger Co.*, 550 F. 2d 1101, 1103 (CA8) ("It is clear that had the Company's offer of reinstatement been conditioned solely on its refusal to give back pay, as the Company strenuously argues, then the offer of reinstatement would not have been invalidated"), cert. denied, 434 U. S. 830 (1977); *Reliance Clay Products Co.*, 105 N. L. R. B. 135, 137 (1953) ("The Board has consistently held that a discriminatorily discharged employee may not refuse" an unconditioned offer of reinstatement even though unaccompanied by backpay; refusal of such an offer tolls the employer's liability for back pay).

[20] In tailoring a Title VII remedy a court " 'has not merely the power but the duty to render a decree which will so far as possible eliminate the discriminatory effects of the past as well as bar like discrimination in the future.' " *Albemarle Paper Co.* v. *Moody*, 422 U. S. 405, 418 (1975) (quoting *Louisiana* v. *United States*, 380 U. S. 145, 154 (1965)).

[21] See, *e. g.*, *NLRB* v. *Huntington Hospital, Inc.*, 550 F. 2d 921, 924 (CA4 1977).

[22] See, *e. g.*, *Zipes* v. *Trans World Airlines, Inc.*, 455 U. S. —— (1982); *Teamsters* v. *United States*, 431 U. S. 324 (1977); *Franks* v. *Bowman Transportation Co.*, 424 U. S. 747 (1976).

Decisions construing the remedial provision of the NLRA, § 10(c), 29 U. S. C. § 160(c), are in accord. See, *e. g.*, *In re Nevada Consolidated Copper Corp.*, 26 N. L. R. B. 1182, 1235 (1940) (persons unlawfully refused jobs must be offered jobs with "any seniority or other rights and privileges they would have acquired, had the respondent not unlawfully discriminated against them") (quoted in *Franks* v. *Bowman Transportation Co.*, *supra*, at 770), enforcement denied, 122 F. 2d 587 (CA10 1941), reversed, 316 U. S. 105 (1942).

[23] Both Ford and the EEOC agree on this point. See Brief for Respondent 19; Reply Brief for Petitioner 9.

In short, the un- or underemployed claimant's statutory obligation to minimize damages requires him to accept an unconditional offer of the job originally sought, even without retroactive seniority. Acceptance of the offer preserves, rather than jeopardizes, the claimant's right to be made whole; in the case of an un- or underemployed claimant, Ford's suggested rule merely embodies the existing requirement of § 706(g) that the claimant minimize damages, without affecting his right to compensation.

B

Ford's proposed rule also is consistent with the policy of full compensation when the claimant has had the good fortune to find a more attractive job than the defendant's, because the availability of the better job terminates the ongoing ill effects of the defendant's refusal to hire the claimant. For example, if Gaddis and Starr considered their jobs at GM to be so far superior to the jobs originally offered by Ford that, even if Ford had hired them at the outset, they would have left Ford's employ to take the new work, continuing to hold Ford responsible for backpay after Gaddis and Starr lost their GM jobs would be to require, in effect, that Ford insure them against the risks of unemployment in a new and independent undertaking. Such a rule would not merely restore Gaddis and Starr to the "'position where they would have been were it not for the unlawful discrimination,'" *Albemarle Paper Co.* v. *Moody*, 422 U. S. 405, 421 (1975) (citation omitted); it would catapult them into a better position than they would have enjoyed in the absence of discrimination.

Likewise, even if Gaddis and Starr considered their GM jobs only somewhat better or even substantially equivalent to the positions they would have held at Ford had Ford hired them initially,[24] their rejection of Ford's unconditional offer could be taken to mean that they believed that the lingering ill effects of Ford's prior refusal to hire them had been extinguished by later developments. If, for example, they thought that the Ford and GM jobs were identical in every respect, offering identical pay, identical conditions of employment, and identical risks of layoff, Gaddis and Starr would have been utterly indifferent as to which job they had—Ford's or GM's. Assuming that they could work at only one job at a time, the ongoing economic ill effects caused by Ford's prior refusal to hire them would have ceased when they found the identical jobs at GM, and they would have had no reason to accept Ford's offers. As in the case of a claimant who lands a better job, therefore, requiring a defendant to provide what amounts to a form of unemployment insurance to claimants, after they have found identical jobs and refused the defendant's unconditional job offer, would be, absent special circumstances, to grant them something more than compensation for their injuries.

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[24] It is possible that they did so value the GM jobs, since they applied at Ford only after being laid off at GM, and since after being recalled to the

In both of these situations, the claimant has the power to accept the defendant's offer and abandon the superior or substantially equivalent replacement job. As in the case of an un- or underemployed claimant, under the rule advocated by Ford acceptance of the defendant's unconditional offer would preserve fully the ultimately victorious claimant's right to full redress for the effects of discrimination.[25] The claimant who chooses not to follow this path does so, then, not because it provides inadequate compensation, but because the value of the replacement job outweighs the value of the defendant's job supplemented by the prospect of full court-ordered com-

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GM jobs they rejected Ford's offer. Therefore, contrary to the dissent's erroneous suggestion, *post*, at 13, the possibility that Gaddis and Starr considered their GM jobs superior to the positions they would have had at Ford had Ford hired them at the outset is not merely a "hypothetical case." We cannot infer that they so valued their GM jobs, however, solely from their rejection of Ford's offer.

[25] See discussion *supra*, at 13–14.

pensation. In other words, the victim of discrimination who finds a better or substantially equivalent job no longer suffers ongoing injury stemming from the unlawful discrimination.

C

Thus, the rule advocated by Ford rests comfortably both on the statutory requirement that a Title VII claimant must minimize damages and on the fact that a claimant is no longer incurring additional injury if he has been able to find other suitable work that, all things considered, is at least as attractive as the defendant's. For this reason, in almost all circumstances the rule is fully consistent with Title VII's object of making injured claimants whole.

The sole question that can be raised regarding whether the rule adequately compensates claimants arises in that narrow category of cases in which the claimant believes his replacement job to be superior to the defendant's job without seniority, but inferior to the defendant's job with the benefits of seniority. In the present case, for example, it is possible that Gaddis and Starr considered their GM jobs more attractive than the jobs offered by Ford, but less satisfactory than the positions they would have held at Ford if Ford had hired them initially. If so, they were confronted with two options. They could have accepted Ford's unconditional offer, preserving their right to full compensation if they prevailed on their Title VII claims, but forfeiting their favorable positions at GM. Alternatively, they could have kept their jobs at GM, retaining the possibility of continued employment there, but, under the operation of the rule advocated here by Ford, losing the right to claim further backpay from Ford after the date of Ford's offer. The court below concluded that under these circumstances Ford's rule would present Gaddis and Starr with an "intolerable choice," 645 F. 2d 183, 192 (CA4 1981), depriving them of the opportunity to receive full compensation.

We agree that Gaddis and Starr had to choose between two alternatives. We do not agree, however, that their opportunity to choose deprived them of compensation. After all, they had the option of accepting Ford's unconditional offer and retaining the right to seek full compensation at trial, which would comport fully with Title VII's goal of making discrimination victims whole. Under the rule advocated by Ford, if Gaddis and Starr chose the option of remaining at their GM jobs rather than accept Ford's offer, it was because they thought that the GM jobs, plus their claims to backpay accrued prior to Ford's offer, were *more* valuable to them than the jobs they originally sought from Ford, plus the right to seek full compensation from the court.[25] It is hard to see how Gaddis and Starr could have been deprived of adequate compensation because they chose to venture upon a path that seemed to them more attractive than the Ford job plus the right to seek full compensation in court.

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[25] Employees value a job for many reasons besides the rate of pay, including, for example, the presence of other workers of the employee's own sex, the availability of recreational facilities at the worksite, staggered work hours, better health benefits, longer vacations, and so forth. What makes one job better than another varies from one employee to another.

Gaddis and Starr presumably rejected Ford's offer because they thought their jobs at GM were worth more to them than full compensation (Ford's offer plus a court award) discounted by the risks of litigation. In essence, the position adopted by the court below and advocated here by the EEOC turns on the fact that we cannot be sure that, had Gaddis and Starr known they were going to win their lawsuit, they still would have rejected Ford's offer. Had they known they were going to win, of course, they would have rejected the Ford job only if they valued the GM jobs more than they valued the combination of Ford's job plus the value of court-ordered compensation *undiscounted* by the risks of litigation. To agree with the EEOC is, in effect, to contend that a claimant is not made whole for purposes of Title VII unless he decided to stay at a replacement job that was worth to him more than the sum of (1) the defendant's job, (2) the right to seek full court-ordered compensation, and, in addition, (3) a sum analogous to insurance against the risk of loss at trial. We discern, however, no reason for concluding that Title VII requires the defendant to insure the claimant against the possibility that the defendant might prevail in the lawsuit.

If the choice presented to Gaddis and Starr was difficult, it was only because it required them to assess their likelihood of prevailing at trial. But surely it cannot be contended for this reason alone that they were deprived of their right to adequate compensation. It is a fact of life that litigation is risky and that a plaintiff with a claim to compensation for his losses must consider the possibility that the claim might be lost at trial, either wrongly, because of litigation error, or rightly, because the defendant was innocent. Ford's rule merely requires the Title VII claimant to decide whether to take the job offered by the defendant, retaining his rights to an award by the court of backpay accrued prior to the effective date of the offer, and any court-ordered retroactive seniority plus compensation for any losses suffered as a result of his lesser seniority before the court's judgment, or, instead, whether to accept a more attractive job from another employer and the limitation of the claim for backpay to the damages that have already accrued. The rule urged by the EEOC and adopted by the court below, by contrast, would have the perverse result of requiring the employer in effect to insure the claimant against the risk that the employer might win at trial.

Therefore, we conclude that, when a claimant rejects the offer of the job he originally sought, as supplemented by a right to full court-ordered compensation, his choice can be taken as establishing that he considers the ongoing injury he has suffered at the hands of the defendant to have been ended by the availability of better opportunities elsewhere. For this reason, we find that, absent special circumstances,[27] the simple rule that the ongoing accrual of backpay liability is tolled when a Title VII claimant rejects the job he originally sought comports with Title VII's policy of making discrimination victims whole.

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[27] If, for example, the claimant has been forced to move a great distance to find a replacement job, a rejection of the employer's offer might reflect the costs of relocation more than a judgment that the replacement job was superior, all things considered, to the defendant's job. In exceptional cir-

V

Although Title VII remedies depend primarily upon the objectives discussed above, the statute also permits us to consider the rights of "innocent third parties." *City of Los Angeles Department of Water & Power* v. *Manhart*, 435 U. S. 702, 723 (1978). See also *Teamsters* v. *United States*, 431 U. S. 324, 371–376 (1977). The lower court's rule places a particularly onerous burden on the innocent employees of an employer charged with discrimination. Under the court's rule, an employer may cap backpay liability only by forcing his incumbent employees to yield seniority to a person who has not proven, and may never prove, unlawful discrimination. As we have acknowledged on numerous occasions, seniority plays a central role in allocating benefits and burdens among employees.[28] In light of the "overriding importance"

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cumstances, the trial court, in the exercise of its sound discretion, could give weight to such factors when deciding whether backpay damages accrued after the rejection of an employer's offer should be awarded to the claimant.

The dissent attempts to characterize "the loss of accumulated seniority at [a] replacement jo[b]" as such a cost of relocation. *Post*, at 12, n. 11. By so doing, the dissent simply confuses the costs of changing from one job to another—whatever the respective advantages and disadvantages of the two jobs might be—with the differences between the two jobs.

[28] Seniority may govern, "not only promotion and layoff, but also transfer, demotion, rest days, shift assignments, prerogative in scheduling vacation, order of layoff, possibilities of lateral transfer to avoid layoff, 'bumping' possibilities in the face of layoff, order of recall, training opportunities, working conditions, length of layoff endured without reducing seniority, length of layoff recall rights will withstand, overtime opportunities, parking privileges, and [even] a preferred place in the punch-out line." *Franks* v. *Bowman Transportation Co.*, 424 U. S. 747, 766–767 (1976) (quoting Stacy, Title VII Seniority Remedies in a Time of Economic Down-

of these rights, *American Tobacco Co.* v. *Patterson*, 456 U. S. —, — (1982) (quoting *Humphrey* v. *Moore*, 375 U. S. 335, 346 (1964)), we should be wary of any rule that encourages job offers that compel innocent workers to sacrifice their seniority to a person who has only claimed, but not yet proven, unlawful discrimination.

The sacrifice demanded by the lower court's rule, moreover, leaves the displaced workers without any remedy against claimants who fail to establish their claims. If, for example, layoffs occur while the Title VII suit is pending, an employer may have to furlough an innocent worker indefinitely while retaining a claimant who was given retroactive seniority. If the claimant subsequently fails to prove unlawful discrimination, the worker unfairly relegated to the unemployment lines has no redress for the wrong done him. We do not believe that "'the large objectives'" of Title VII, *Albemarle Paper Co.* v. *Moody*, 422 U. S. 405, 416 (1975) (citation omitted), require innocent employees to carry such a heavy burden.[29]

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turn, 28 Vand. L. Rev. 487, 490 (1975)).

[29] In addition to the rights of innocent employees, the rule urged by the EEOC and adopted by the court below burdens innocent employers. An innocent employer—or one who believes himself innocent—has the right to challenge in court claims he considers weak or baseless. The approach endorsed by the lower court undermines this right by requiring the employer, if he wishes to offer some relief to the claimant and toll the mounting backpay bill, to surrender his defense to the charge that the claimant is entitled to retroactive seniority. If the employer offers the claimant retroactive seniority as well as a job, and then prevails at trial, he will have no recourse against the claimant for the costs of the retroactive seniority that the claimant erroneously received. The rule urged by Ford permits the parties to stem the ongoing effects of the alleged discrimination without compelling either claimant or employer to compromise his claims or surrender his defenses. Cf. *Moro Motors Ltd.*, 216 N. L. R. B. 192, 193 (1975) ("were [an employer] required to offer to an employee, allegedly discharged for discriminatory reasons, reinstatement *with accrued back pay*, the [employer's] right to litigate the issue of whether the discharge was

VI

In conclusion, we find that the rule adopted by the court below disserves Title VII's primary goal of getting the victims of employment discrimination into the jobs they deserve as quickly as possible. The rule, moreover, threatens the interests of other, innocent employees by disrupting the established seniority hierarchy, with the attendant risk that an innocent employee will be unfairly laid off or disadvantaged because a Title VII claimant unfairly has been granted seniority.

On the other hand, the rule that a Title VII claimant's rejection of a defendant's job offer normally ends the defendant's ongoing responsibility for backpay suffers neither of these disadvantages, while nevertheless adequately satisfying Title VII's compensation goals. Most important, it also serves as a potent force on behalf of Title VII's objective of bringing discrimination to an end more quickly than is often possible through litigation. For these reasons we hold that, absent special circumstances, the rejection of an employer's unconditional job offer ends the accrual of potential backpay liability. We reverse the judgment of the Court of Appeals and remand for proceedings consistent with this opinion.

So ordered.

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unlawful would for all practical purposes be nullified") (emphasis in original); *National Screen Products Co.*, 147 N. L. R. B. 746, 747–748 (1964).

SUPREME COURT OF THE UNITED STATES

No. 81-300

FORD MOTOR COMPANY, PETITIONER *v.* EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

[June 28, 1982]

JUSTICE BLACKMUN, with whom JUSTICE BRENNAN and JUSTICE MARSHALL join, dissenting.

After finding that petitioner Ford Motor Company had discriminated unlawfully against Judy Gaddis and Rebecca Starr because of their sex, the Court of Appeals affirmed the District Court's backpay award to the two women "as a proper exercise of discretion founded on not clearly erroneous factual determinations." 645 F. 2d 183, 201 (CA4 1981). The Court today reverses this unremarkable holding with a wide-ranging advisory ruling stretching far beyond the confines of this case. The Court's rule provides employers who have engaged in unlawful hiring practices with a unilateral device to cut off their backpay liability to the victims of their past discrimination.

To justify its new rule, the Court mischaracterizes the holding of the Court of Appeals, undertakes an intricate economic analysis of hypothetical situations not presented here, and invokes the rights of "'innocent third parties,'" *ante*, at 20, who are not before the Court. By so doing, the Court not only supplants traditional district court discretion to mold equitable relief, but also ensures that Judy Gaddis and Rebecca Starr—the only Title VII claimants whose rights are at issue in this lawsuit—will not be made whole for injury they indisputably have suffered. I find the Court's ruling both unnecessary and unfair. I dissent.

I

A

The Court frames the question presented as "whether an employer charged with discrimination in hiring can toll the continuing accrual of backpay liability . . . simply by unconditionally offering the [Title VII] claimant the job previously denied, or whether the employer also must offer seniority retroactive to the date of the alleged discrimination." *Ante*, at 1. In my view, the Court simply and completely misstates the issue. The question before us is not which of two inflexible standards should govern accrual of backpay liability in *all* Title VII cases, but whether the District Court's award of backpay relief to Gaddis and Starr *in this case* constituted an abuse of discretion.

The Court makes frequent and puzzling reference to the "onerous burden[s]" and "sacrifice demanded by the lower court's rule." *Ante*, at 20–21. See also *ante*, at 8 ("the lower court's rule"); *ante*, at 10 ("[t]he rule adopted by the court below"); *ante*, at 10 ("the Court of Appeals' rule"); *ante*, at 11, n. 12 ("the rule applied by the court below"); *ante*, at 19 ([t]he rule . . . adopted by the court below"); *ante*, at 22 ("the rule adopted by the court below"). In fact, the Court of Appeals adopted no inflexible "rule" at all. Rather, it simply applied the well-settled and flexible principles of appellate review of Title VII remedies prescribed in *Albemarle Paper Co.* v. *Moody*, 422 U. S. 405 (1975), and *Franks* v. *Bowman Transportation Co.*, 424 U. S. 747 (1976).

In *Albemarle*, this Court directed that, in most Title VII matters, "the standard of [appellate] review will be the familiar one of whether the District Court was 'clearly erroneous' in its factual findings and whether it 'abused' its traditional discretion to locate 'a just result' in light of the circumstances peculiar to the case," 422 U. S., at 424 (citation omitted). With regard to Title VII backpay relief, however, the Court specified that "'the [district] court has not merely the power

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but the duty to render a decree which will so far as possible eliminate the discriminatory effects of the past as well as bar like discrimination in the future.'" *Id.*, at 418, quoting *Louisiana* v. *United States*, 380 U. S. 145, 154 (1965). To achieve this purpose, "Congress took care to arm the courts with full equitable powers. For it is the historic purpose of equity to 'secur[e] complete justice.'" 422 U. S., at 418 (citation omitted).[1]

The Court in *Albemarle* and *Franks* made clear that, in Title VII cases, the equitable discretion of district courts should be guided by a heavy presumption in favor of full backpay awards. "Rather than limiting the power of district courts to do equity, the presumption insures that complete equity normally will be accomplished." *Franks* v. *Bowman Transportation Co.*, 424 U. S., at 786 (POWELL, J., concurring in part and dissenting in part). By exercising their discretion to award full backpay relief, district courts further two broad purposes underlying Title VII. First, "the reasonably certain prospect of a backpay award . . . 'provide[s] the spur or catalyst which causes employers . . . to self-examine and to self-evaluate their employment practices and to endeavor to eliminate, so far as possible, the last vestiges'" of discrimination. *Albemarle Paper Co.* v. *Moody*, 422 U. S., at 417–418 (citation omitted). Second, backpay awards "make persons whole for injuries suffered on account of unlawful employment discrimination." *Id.*, at 418.

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[1] In passing the Equal Employment Opportunity Act of 1972, 86 Stat. 103, Congress specifically rejected several legislative efforts to limit the judicial power to award backpay. See *Albemarle Paper Co.* v. *Moody*, 422 U. S. 405, 420 (1975). The Section-by-Section Analysis accompanying the Conference Committee Report reaffirmed the "make whole" purpose of § 706(g), Title VII's backpay provision:

"The provisions of this subsection are intended to give the courts wide discretion exercising their equitable powers to fashion the most complete relief possible. In dealing with the present section 706(g) the courts have stressed that the scope of relief under that section of the Act is intended to make the victims of unlawful discrimination whole, and that the attainment of this objective . . . requires that persons aggrieved by the consequences and effects of the unlawful employment practice be, so far as possible, restored to a position where they would have been were it not for the unlawful discrimination." 118 Cong. Rec. 7168 (1972), quoted in *Albemarle Paper Co.* v. *Moody*, 422 U. S., at 421.

Thus, the goal of appellate review is to ensure that the district courts have exercised their remedial discretion in the way that "allow[s] the most complete achievement of the objectives of Title VII that is attainable under the facts and circumstances of the specific case." *Franks* v. *Bowman Transportation Co.*, 424 U. S., at 770–771. "The courts of appeals must maintain a consistent and principled application of the backpay provision, consistent with [Title VII's] twin statutory objectives, while at the same time recognizing that the trial court will often have the keener appreciation of those facts and circumstances peculiar to particular cases." *Albemarle Paper Co.* v. *Moody*, 422 U. S., at 421–422.

B

In this case, the trial court's findings of fact were uncontroverted. In July 1971, Judy Gaddis and Rebecca Starr sought jobs at petitioner Ford's automotive parts warehouse in Charlotte, N. C. "Because of their experience, each was qualified to work at Ford as a 'picker-packer.'" App. to Pet. for Cert. A–159 (District Court's Findings of Fact). Ford's stated hiring practice was to fill job vacancies at the warehouse by "taking the earliest filed applications first," and selecting employees by interviewing qualified candidates. *Id.*, at A–157. At the time Gaddis and Starr applied, however, Ford had never hired any woman to work at the warehouse.[2] *Id.*, at A–167 – A–168. When Gaddis and

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[2] The District Court found, for example, that the job application of Zettie Smith, who sought employment at Ford about a month before Gaddis and Starr, and who was the first woman to apply for a warehouse job there, "was never seriously considered because she is a woman." App. to Pet.

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Starr received their application forms, "a receptionist at Ford . . . told them in substance that Ford did not hire women to work in the warehouse." *Id.*, at A–159.

Despite Gaddis' persistent requests for job interviews, petitioner interviewed neither woman immediately, supposedly because no job vacancy existed. *Id.*, at A–160 – A–161. The unit supervisor testified: "Ms. Gaddis called me on several occasions and asked if I was hiring, and I said no, . . . I just have too much work to do to sit down and interview people if I'm not hiring." App. 31. Shortly thereafter, however, in August 1971, Ford hired male applicants to fill four job openings. App. to Pet. for Cert. A–159 – A–160. "At least two of the men . . . were offered their jobs *after* Gaddis and Starr applied." *Id.*, at A–160 (emphasis in original).

Gaddis filed a sex discrimination charge with respondent EEOC in September 1971. *Id.*, at A–154. In January 1973, Gaddis and Starr were recalled to jobs at a nearby General Motors warehouse. In July 1973, petitioner made a vague job offer first to Gaddis, then to Starr.[3] The District Court

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for Cert. A–157 – A–158.

[3] At trial, Gaddis was asked:

"Q. Did [the clerk to the warehouse manager] say that the job was being offered to you, or did he discuss simply with you, in the form of an interview, the possibility of hiring you into some job?

A. It was so vague that I couldn't pinpoint anything down. They never did say what type of work it would be, whether it would be [parts] picking or whether it would be in sheet metal or whether it would be putting up stock or whether it would be on a day shift or night shift, whether it was a permanent or temporary job. At the time, I had a good seniority with General Motors and I had a secure job, and so on those grounds, I refused it." App. 43.

Similarly, Starr testified on cross-examination:

"I remember [the clerk to the warehouse manager] wasn't specific on the job about what it would be. I did have, at General Motors I had fifteen, I don't know if it was fourteen or fifteen people under me. I had seniority, and I also, this is the truth about [it,] I was scared. Whenever I had worked at Ford before, I had been badgered and I don't know, I was just, I found as a fact that "[t]he offer to the two women was made after Ford learned that a charge of sex discrimination had been filed with the Commission (and was prompted by a desire to bring some women into the warehouse in response to the charge)." *Id.*, at A–162 – A–163.[4]

Gaddis, and then Starr, turned down petitioner's job offer. The District Court found that the offer was "refused by both women since they were at that time back at work in the General Motors warehouse, having been recalled to work in January, 1973. Neither woman wished to lose accrued seniority at General Motors and neither wanted to be the only woman employed in the Ford warehouse." *Id.*, at A–163.

Based on its factual findings, the District Court concluded as a matter of law that "Ford discriminated against . . . Gaddis and Starr on the basis of their sex by failing to employ them in its warehouse in the positions filled in August, 1971." *Id.*, at A–167. In rulings not contested here, the District Court also found that 10 other women had established prima facie cases of unlawful sex discrimination by Ford. *Id.*, at A–168.

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wanted to look into the job. Yet, I had a fear to go back. I didn't know what I would be facing." *Id.*, at 54.

[4] The trial testimony of Ford's warehouse operations manager illuminates petitioner's motives:

"Q. Whose decision was it to call Ms. Gaddis and Ms. Starr?
A. It was my decision.
Q. Why?
A. Well, mainly because we had a suit, EEOC suit filed against us, and we wanted to give one of them an opportunity to go to work for us, and we only had one, maybe two openings at that time.

. . . . .

Q. Mr. Ely, you indicated in your testimony that you offered a job to one of the women, either Ms. Gaddis or Ms. Starr, in July, 1973. Is that correct?
A. Yes, that's correct.
Q. You also stated that you offered such job because of the EEOC charge which had been filed against Ford Motor Company. Is that correct?
A. That's correct." App. 17–18.

To determine the backpay remedy to which Gaddis and Starr were entitled, the District Court attached no legal significance to the women's decision to decline beginning employment at Ford nearly two years after they unlawfully had been denied those same jobs and six months after they had begun accumulating seniority elsewhere.[5] In the ruling which the Court today implicitly deems an abuse of discretion, the District Court held that "[b]ack pay due to Gaddis and Starr shall not be affected by their refusal to accept the single position offered them in July, 1973, inasmuch as neither would have been confronted by that decision and its implications had both been hired in August, 1971." *Id.*, at A-171.

Applying the standard of review specified in *Franks*, *supra*, and *Albemarle*, *supra*, the Court of Appeals, 645 F. 2d, at 200, affirmed "the district court's decision as a proper exercise of discretion founded on not clearly erroneous factual determinations." *Id.*, at 201. In particular, the Court of Appeals found no abuse of discretion in the District Court's failure to terminate the backpay awards in July 1973.[6]

The Court of Appeals rested its narrow ruling on two key facts: that "Gaddis and Starr could accept [Ford's] offer only by *forfeiting the seniority* they had accumulated at General Motors and *without a compensating offer of seniority at Ford* to alleviate the effects of the discrimination against them in 1971." *Ibid.* (Emphasis added.) The court expressed no view as to whether Ford's backpay liability would have been tolled if Gaddis and Starr could have accepted Ford's job offer without forfeiting seniority accumulated elsewhere. Nor did the Court of Appeals decide whether the women would have been obliged to accept Ford's offer had it encompassed *some* compensating offer of seniority, short of full retroactive seniority.

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[5] The District Court applied two equitable principles to shape relief in this case. It first concluded that an award of all backpay accruing after August 1971 would make Gaddis and Starr whole. The District Court therefore reconstructed a probable employment history at Ford for each woman, calculating what each would have received but for petitioner's unlawful discrimination. Second, the court obliged Gaddis and Starr to take all reasonable steps to mitigate damages. Accordingly, it subtracted from the backpay awards any amounts Gaddis and Starr actually earned or reasonably could have earned after August 1971. App. to Pet. for Cert. A-170.

[6] "[T]he district court reached an eminently reasonable result. It did not permit Ford to cut off the back pay period by making Gaddis and Starr an incomplete and unacceptable offer, and it denied Gaddis and Starr a double recovery by deducting their General Motors wages from their back pay awards." 645 F. 2d 183, 193 (CA4 1981).

Contrary to this Court's suggestion today, the Court of Appeals announced no general *rule* that an employer's "backpay liability should be tolled *only* by the rejection of an offer that includes seniority retroactive to the date on which the alleged discrimination occurred." *Ante*, at 8 (emphasis added). The Court of Appeals merely refused to announce a broad new rule, urged by Ford, requiring victims of Title VII discrimination to "accept job offers which include a loss of seniority in order to preserve their back pay rights." 645 F. 2d, at 192. Such an inflexible approach, the court decided, would frustrate Title VII's central purposes by permitting employers to present discriminatees with an "intolerable choice."[7] *Ibid.*

II

The Court today accepts Ford's invitation, wisely declined by the Court of Appeals, and adopts its broad new rule governing awards of backpay relief in Title VII cases: henceforth, "absent special circumstances, the rejection of an employer's unconditional job offer ends the accrual of potential backpay liability."[8] *Ante*, at 22. This ruling is disturbing in four respects.

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[7] "[I]f Gaddis and Starr rejected Ford's offer and stayed at General Motors, they would forego their rights to further back pay benefits. On the other hand, if they accepted the job offered by Ford, which they had not held for the previous two years because of Ford's discriminatory hiring policy, they would lose their seniority rights at General Motors." 645 F. 2d, at 192.

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First: The Court's new rule is flatly inconsistent with *Albemarle's* unambiguous directive "that, given a finding of unlawful discrimination, backpay should be denied only for reasons which, if applied generally, would not frustrate the central statutory purposes of eradicating discrimination throughout the economy and making persons whole for injuries suffered through past discrimination." 422 U. S., at 421. Applied generally, the Court's rule interferes with both objectives.

The Court's approach authorizes employers to make "cheap offers" to the victims of their past discrimination. Employers may now terminate their backpay liability unilaterally by extending to their discrimination victims offers they cannot reasonably accept. Once an employer has refused to hire a job applicant, and that applicant has mitigated damages by obtaining and accumulating seniority in another job, the employer may offer the applicant the same job that she was denied unlawfully several years earlier. In this very case, for example, Ford offered Gaddis and Starr jobs only after they had obtained employment elsewhere and only because they had filed charges with the EEOC. If, as here, the applicant declines the offer to preserve existing job security, the employer has successfully cut off all future backpay liability to that applicant. By insulating a discriminating employer from proper liability for his discriminatory acts, the Court's rule reduces his "incentive to shun practices of dubious legality," *id.*, at 417, and hinders the eradication of discrimination.

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[8] The Court's explanation for its misreading of the Court of Appeals' decision is that the United States District Court for the Western District of Virginia has interpreted that decision as stating a somewhat different proposition. See *ante*, at 8, n. 10. But if one District Court in the Fourth Circuit has misconstrued the Fourth Circuit's opinion, surely that is a matter properly to be corrected by the United States Court of Appeals for the Fourth Circuit. This Court is not entitled to transform a narrow Court of Appeals ruling into a broad one, just so that it may reverse and install a broad new rule of its own choosing.

The Court's rule also violates Title VII's second objective—making victims of discrimination whole. Again, the rule's anomalies are well-illustrated by the facts of this case. Had petitioner not discriminated against Gaddis and Starr, both would have begun to work at Ford in August 1971. By July 1973, both would have accumulated nearly two years of seniority. Because of Ford's discrimination, however, each experienced long periods of unemployment and temporary employment before obtaining jobs elsewhere.[9] The District Court therefore determined that only full backpay awards, mitigated by wages earned or reasonably earnable elsewhere, would make Gaddis and Starr whole.

This Court now truncates those awards simply because Gaddis and Starr refused to accept Ford's offers of beginning employment in 1973. Yet even if Gaddis and Starr had accepted those offers, they would not have been made whole. Deprived of two years of seniority, Gaddis and Starr would have enjoyed lesser health, life, and unemployment insurance benefits, lower wages, less eligibility for promotion and transfer, and greater vulnerability to layoffs than persons hired after they were unlawfully refused employment. See Tr. of Oral Arg. 30; Brief for United States 17. Even if Gaddis and Starr had continued to litigate the question of their retroactive seniority after accepting Ford's offer, they still would have spent many years at Ford "subordinate to persons who, but for the illegal discrimination, would have been[,] in respect to entitlement to [competitive seniority] benefits[,] [their] inferiors." *Franks* v. *Bowman Transportation Co.*, 424 U. S., at 768.

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[9] Gaddis, for example, sought employment in South Carolina, "at various parts places, independent part places, car dealers, such as Chrysler-Plymouth, the Ford place which was Lewis Ford at that time, all the car dealers, . . . some of the hosiery mills, . . . [and] Radiator Specialty Company," III Tr. 362, before obtaining her job at General Motors.

The Court claims that its new rule "powerfully motivates employers to put Title VII claimants to work, thus ending ongoing discrimination as promptly as possible." *Ante*, at 10. In fact, the discrimination is not ended, because a discrimination victim who accepts a "cheap offer" will be obliged to work at a seniority disadvantage, and therefore will suffer ongoing effects from the employer's discriminatory act. The Court also alleges that its rule promotes "cooperation and voluntary compliance" with Title VII by giving both employers and claimants incentives to make and accept "unconditional" job offers. *Ante*, at 9–10. If the Court's rule furthers this end, however, it does so only by weakening the bargaining position of a claimant vis-a-vis the employer. Discrimination victims will be forced to accept otherwise unacceptable offers, because they will know that rejection of those offers truncates their backpay recovery. A rule that shields discriminating employers from liability for their past discrimination and coerces bona fide Title VII claimants to accept incomplete job offers is fundamentally incompatible with the purposes of Title VII.

Second: The Court's rule unjustifiably limits a district court's discretion to make individual discrimination victims whole through awards of backpay. The Court suggests that, "absent special circumstances," a district court abuses its discretion *per se* if it fails to terminate an employer's backpay liability at the point where that employer has extended an unconditional job offer to a discrimination claimant. Yet "[i]n *Albemarle Paper* the Court read Title VII as creating a *presumption in favor* of backpay." *Franks* v. *Bowman Transportation Co.*, 424 U. S., at 786 (POWELL, J., concurring in part and dissenting in part) (emphasis added).[10]

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[10] The Court cites language from *Albemarle* suggesting that a district

Franks supplied "emphatic confirmation that federal courts are empowered to fashion such relief as the *particular circumstances of a case may require* to effect restitution, making whole insofar as possible the victims of . . . discrimination in hiring." *Id.*, at 764 (opinion of the Court) (emphasis added).

The Court recognizes that its new rule interferes with district court discretion to make complete backpay awards in individual cases. Thus, the Court expressly preserves the principle of appellate deference to the "sound discretion" of the trial court in "exceptional circumstances." *Ante*, at 19–20, n. 27. Yet, curiously, the Court offers no explanation why the facts of this very case fail to satisfy its own "exceptional circumstances" test.[11] Given the Court's concession that district courts must retain their discretion to make bona fide Title VII claimants whole in some cases, I see no advantage in prescribing a blanket rule that displaces that discre-

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court's discretion is not limitless. See *ante*, at 7–8. But the Court conspicuously omits *Albemarle's* clear statement that if Congress intended to limit the equitable discretion of district courts in any way, it did so only by leaving " 'little room for the exercise of discretion *not* to order reimbursement.' " See *Albemarle Paper Co.* v. *Moody*, 422 U. S., at 417, citing *Mitchell* v. *DeMario Jewelry*, 361 U. S. 288, 296 (1960) (emphasis added).

[11] The Court suggests, for example, that if a hypothetical Title VII "claimant has been forced to move a great distance to find a replacement job, a rejection of the employer's offer might reflect the costs of relocation more than a judgment that the replacement job was superior, all things considered, to the defendant's job." *Ante*, at 19–20, n. 27. For Gaddis and Starr, however, the loss of their accumulated seniority at their replacement jobs certainly reflected "costs of relocation" at least as substantial as high moving expenses.

I expect that federal courts will find no meaningful distinction between a worker's refusal to accept a job offer because he believes that acceptance would force him to incur costs, and a similar refusal based on the worker's judgment that changing jobs would prove costly. In either case, for purposes of awarding Title VII relief, the reasonableness of the worker's refusal should be left to the trial court's discretion.

tion in other cases where complete relief is equally justified.

Third: I am disturbed by the Court's efforts to justify its rule by relying on situations not presented by this case. For example, the Court partially rests its rule on an "un- or underemployed claimant's statutory obligation to minimize damages" by accepting an unconditional job offer without seniority. *Ante*, at 15. Because Gaddis and Starr were fully employed when Ford finally offered them jobs, however, neither the District Court nor the Court of Appeals exempted unemployed or underemployed victims of discrimination from accepting offers like Ford's.[12] Similarly, the Court analyzes the hypothetical case of a Title VII claimant who "has had the good fortune to find a more attractive job than the defendant's." *Ibid.* But, as the Court later recognizes, there is no assurance that the present case fits this category either. After speculating at length about how Gaddis and Starr may have valued the relative worth of their Ford and General Motors jobs, see *ante*, at 15–17, the Court finally acknowledges that on this paper record, "[w]e cannot infer" how much Gaddis and Starr "valued their GM jobs . . . solely from their rejection of Ford's offer." *Ante*, at 16, n. 24.

Equally unconvincing is the Court's repeated invocation of, and preoccupation with, "the rights of 'innocent third parties,'" *ante*, at 20, and the "disruption of the existing seniority system[s]," *ante*, at 10, that would result from adoption of the Court of Appeals' "rule." The Court nowhere demonstrates how *petitioner's* labor relations would have suffered had Ford extended offers of retroactive seniority to Gaddis and Starr. The details of Ford's collective-bargaining agreement were not litigated in either the District Court or the

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[12] The purpose of § 706(g)'s "mitigation of damages" requirement is to encourage claimants to work while their Title VII claims are being adjudicated. The Court cannot deny that Gaddis and Starr fully mitigated damages by seeking and obtaining other employment while litigating their claims against Ford.

Court of Appeals. See Tr. of Oral Arg. 30–31. Thus, those courts never passed on petitioner's obligation to offer retroactive seniority to Gaddis and Starr if such an offer would have disrupted its labor relations or existing seniority systems.[13] Nor did the Court of Appeals decide, as a general matter, whether or not offers of retroactive seniority to discrimination claimants adversely affect the rights of incumbent employees.[14] The Court cannot justify reversal in the case at hand by vague reference to classes of claimants and third parties who are not before the Court. To the extent that it seeks to do so, its intricate argument is both irrelevant and advisory.

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[13] The Court of Appeals did not foreclose the possibility that Ford could have terminated its backpay liability to Gaddis and Starr by offering them employment plus an award of *provisional* seniority, defeasible in the event that they lost their continuing lawsuit for backpay. Nor did the Court of Appeals deny that offering a job without seniority might terminate Ford's backpay liability, should any provision of Ford's collective-bargaining agreement preclude it from making offers of retroactive seniority. Had petitioner pointed to such a collective-bargaining agreement provision, or proved that its incumbent employees actually had objected to offers of retroactive seniority to Title VII claimants, the Court of Appeals would have considered those factors in determining whether the District Court abused its discretion in shaping Gaddis' and Starr's relief.

[14] In any event, the Court's claim that offers of retroactive seniority would injure the rights of incumbent employees is vastly overstated. If an employer sued by a Title VII claimant could toll the accrual of backpay liability by making a unilateral offer that included some form of retroactive seniority, he still would have every incentive to make such an offer as soon as possible after the discriminatory act. The amount of retroactive seniority offered would necessarily be small, and the seniority rights of relatively few incumbent employees would be affected.

Under the Court's approach, in contrast, employers will no longer have any incentive to offer retroactive seniority. Any awards of retroactive seniority to bona fide Title VII claimants will thus be court-ordered, and will be entered only after "the lengthy delays that too often attend Title VII litigation." *Ante*, at 2. By delaying awards of retroactive seniority until final judgment in a significant number of cases, the Court's approach ensures that the seniority rights of comparatively greater numbers of incumbent employees will be affected adversely.

Fourth and finally: I am struck by the contrast between the Court's concern for parties who are not here and its studied indifference to the real-life concerns of the parties whose interests are directly affected. When the Court finally confronts the choice that actually faced Gaddis and Starr, *ante*, at 17–20, it blithely suggests that "[a]fter all, they had the option of accepting Ford's unconditional offer and retaining the right to seek full compensation at trial" in the form of retroactive seniority. *Ante*, at 18. Yet the Court earlier acknowledges that "[d]elays in litigation unfortunately are now commonplace, forcing the victims of discrimination to suffer years of underemployment or unemployment before they can obtain a court order awarding them the jobs unlawfully denied them." *Ante*, at 9.

"If the choice presented to Gaddis and Starr was difficult," the Court continues, "it was only because it required them to assess their likelihood of prevailing at trial." *Ante*, at 19. Without consulting the record, the Court then states:

> "Gaddis and Starr presumably rejected Ford's offer because they thought their jobs at GM were worth more to them than full compensation (Ford's offer plus a court award) discounted by the risks of litigation. . . . Had they known they were going to win [their lawsuit], of course, they would have rejected the Ford job only if they valued the GM jobs more than they valued the combination of Ford's job plus the value of court-ordered compensation *un*discounted by the risks of litigation." *Ante*, at 18, n. 26 (emphasis in original).

This is a comfortable rationale stated from the sidelines. Unfortunately, the abstract and technical concerns that govern the Court's calculations bear little resemblance to those that actually motivated Judy Gaddis and Rebecca Starr. When asked on cross-examination why she had turned down Ford's 1973 offer, Gaddis testified: "I had seniority [at General Motors] and I knew that I wasn't in danger of any layoff, where if I had accepted the job at Ford *I might have worked a week or two weeks and been laid off because I would have been low seniority.*" App. 47 (emphasis added). Similarly, Starr testified on cross-examination: "I had seniority at General Motors. I had about fifteen people working under me. *I could go to work at Ford and work a week and I knew that they could lay me off.*" IV Tr. 365–366 (emphasis added).

To a person living in the real world, the value of job security today far outstrips the value of full court-ordered compensation many years in the future. The Court's elaborate speculation about the concerns that "presumably" motivated Gaddis and Starr nowhere recognizes what a Ford job without seniority actually meant to Gaddis and Starr—a job from which they could be laid off at any moment. Unlike the Court, Gaddis and Starr recognized that if they traded their jobs with seniority for jobs without seniority, they could quickly become unemployed again, long before they had the chance to vindicate their rights at trial.

To people like Gaddis and Starr, the knowledge that they might someday establish their Title VII claims on the merits provides little solace for their immediate and pressing personal needs. Starr's trial testimony reveals just how much job security meant to her:

> "It was just a couple of days after I had [started working] there [at a temporary job] and this is, I was just wanting that job so bad because you can't, a woman, when you've got three children, I needed the money, and I was wanting the job so bad. I worked so hard. I'll never forget one day when [the unit supervisor] came to me. I'll never forget that, and he said, I had just been there a few days, I'll have to let you go. . . . It broke my heart because I knew I had worked so hard." IV Tr. 356.[15]

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[15] Without embarrassment, the Court cites Rebecca Starr's testimony to

I agree with the Court that "the victims of job discrimination want jobs, not lawsuits." *Ante*, at 11. See also, *ante*, at 2 ("The claimant needs work that will feed a family and restore self-respect. A job is needed—now.") When Ford made its 1973 offers to Gaddis and Starr, however, they *had* jobs, in which they had accumulated seniority despite Ford's discrimination. I therefore cannot accept the Court's conclusion that these women should have traded those jobs for uncertain employment in which back seniority could be won only by lawsuit. Nor can I justify penalizing Gaddis and Starr because they "discounted" the ultimate likelihood of obtaining court-ordered retroactive seniority at a different rate than the Court does today.

After hearing all the witnesses and appraising all the evidence, the District Court exercised its equitable discretion to shape complete backpay relief for Gaddis and Starr. In light of all the circumstances, the District Court refused to penalize Gaddis and Starr for declining Ford's 1973 job offer. Applying the correct standard of review over Title VII remedies, the Court of Appeals concluded that the District Court had exercised its remedial discretion properly. Sitting at this remove, I cannot say that Gaddis and Starr acted unreasonably. I would affirm the judgment of the Court of Appeals and thereby, for these two victims of discrimination, fulfill, and not defeat, the promise of Title VII.

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support its argument that the Court of Appeals' "rule," and not its own new rule, is indifferent to the real-life concerns of victims of sex discrimination. See *ante*, at 11, n. 12. Under the Court of Appeals' "rule," however, Rebecca Starr was awarded full backpay as compensation for Ford's sex discrimination. Under this Court's rule, a large portion of Starr's compensation will simply be cut off. By claiming that the Court of Appeals was somehow *more* indifferent to Starr's real-life concerns, the Court only confirms how far removed from the real world it is.

All issues available have been filmed. Unfortunately, any scattered missing issues are no longer available.

READEX FICHE

81/81-328

(Slip Opinion)

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Lumber Co.*, 200 U. S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

RODRIGUEZ ET AL. *v.* POPULAR DEMOCRATIC PARTY ET AL.

APPEAL FROM THE SUPREME COURT OF PUERTO RICO

No. 81-328. Argued March 22, 1982—Decided June 7, 1982

A member of appellee Popular Democratic Party who was elected in a 1980 general election to the Puerto Rico House of Representatives from District 31, died in 1981. The Governor of Puerto Rico subsequently called for a "by-election"—open to all qualified voters in District 31—to fill the vacancy. Appellee then filed suit in the Superior Court of Puerto Rico, alleging that the Puerto Rico statutes under which the Governor purported to act authorized only candidates and electors affiliated with appellee party to participate in the by-election. Appellants, qualified electors in District 31 who are not affiliated with appellee party, intervened as defendants. The court entered judgment for appellee. The Puerto Rico Supreme Court modified the Superior Court's judgment, holding, *inter alia*, that the pertinent statute, as properly construed, requires a by-election only if the party of the legislator vacating the seat fails to designate a replacement within 60 days after the vacancy occurs, and that if the party selects a single candidate within such period, that candidate is declared "automatically elected to fill the vacancy." The court rejected appellants' contention that this procedure violated the Federal Constitution. While the case was pending before the Puerto Rico Supreme Court, appellee held a primary election in which only its members were permitted to participate and which resulted in the selection of a person who, pursuant to the Supreme Court's mandate, was sworn in as the new representative from District 31.

Held: The Puerto Rico statute, as interpreted by the Puerto Rico Supreme Court to vest in a political party the initial authority to appoint an interim replacement for one of its members who vacates a position as a district senator or representative, does not violate the Federal Constitution. Pp. 4–13.

(a) The voting rights of Puerto Rico citizens are constitutionally pro-

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tected to the same extent as those of all other United States citizens. At the same time, Puerto Rico, like a state, is an autonomous political entity, "sovereign over matters not ruled by the Constitution," *Calero-Toledo* v. *Pearson Yacht Leasing Co.*, 416 U. S. 663, 673, and the methods by which its people and their representatives have chosen to structure the Commonwealth's electoral system are entitled to substantial deference. P. 6.

(b) The right to vote, *per se*, is not a constitutionally protected right, and the Constitution does not compel a fixed method of choosing state or local officers or representatives. While a citizen has a constitutionally protected right to participate in elections on an equal basis with other citizens in the jurisdiction when a state or the Commonwealth of Puerto Rico has provided that its representatives be elected, the Puerto Rico statute at issue does not restrict access to the electoral process or afford unequal treatment to different classes of voters, candidates, or political parties. All qualified voters have an equal opportunity to select a district representative in the general election; and the interim appointment provision applies uniformly to all legislative vacancies, whenever they arise. Cf. *Valenti* v. *Rockefeller*, 393 U. S. 405. Moreover, the interim appointment system serves the legitimate purpose of ensuring that vacancies are filled promptly, without necessity of the expense and inconvenience of a special election. Pp. 6–10.

(c) Nor is Puerto Rico's appointment mechanism rendered constitutionally defective by virtue of the fact that the interim appointment power is given to the political party with which the previous incumbent was affiliated. The Puerto Rico Legislature could reasonably conclude that appointment by the previous incumbent's political party would more fairly reflect the will of the voters than appointment by the Governor or some other elected official, particularly where such official is a member of a different party. And in light of Puerto Rico's special interest in ensuring minority representation in its legislature, it was not unreasonable for the legislature, in establishing the appointment system for filling vacancies, to make provision for continuity of party representation. Pp. 10–12.

(d) Appellants' rights of association and equal protection of the laws were not violated by their exclusion, because of their party affiliation, from appellee's special election held to select the interim representative. Puerto Rico law authorized appellee to designate the interim replacement, and it was entitled to adopt its own procedures for such selection. Appellee was not required to include participation by nonmembers. Pp. 12–13.

—— P.R.R. ——, affirmed.

BURGER, C. J., delivered the opinion for a unanimous Court.

NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D.C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

SUPREME COURT OF THE UNITED STATES

No. 81-328

JESUS RIVERA-RODRIGUEZ ET AL., APPELLANTS *v.* POPULAR DEMOCRATIC PARTY ET AL.

APPEAL FROM THE SUPREME COURT OF PUERTO RICO

[June 7, 1982]

CHIEF JUSTICE BURGER delivered the opinion of the Court.

The question presented by this appeal is whether Puerto Rico may by statute vest in a political party the power to fill an interim vacancy in the Puerto Rico legislature. The Supreme Court of Puerto Rico held that such a procedure did not violate the United States Constitution. We noted probable jurisdiction, —— U. S.—— (1981), and we affirm.

I

In the November 4, 1980, Puerto Rico general election, Ramon Muniz, a member of appellee Popular Democratic Party, was elected to the Puerto Rico House of Representatives from District 31.[1] Muniz died on January 28, 1981. The Governor of Puerto Rico, a member of the opposition New Progressive Party, subsequently called for a "by-election"—open to all qualified voters in District 31—to fill the vacancy caused by Muniz' death. The Governor purported to act pursuant to Articles 5.006 and 5.007 of the Electoral

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[1] The Puerto Rico Legislative Assembly consists of two chambers—the House of Representatives, with 51 members, and the Senate, with 27 members. P.R. Const., Art. III, §§ 1 and 2. A single general election is held in Puerto Rico every four years for all elective officials. *Id.*, Art. VI, § 4; P.R. Laws Ann., Tit. 16, §§ 3201, 3205 (Supp. 1980).

Law of Puerto Rico, P.R. Laws Ann., Tit. 16, §§3206, 3207 (Supp. 1980).[2]

On March 3, 1981, the Popular Democratic Party instituted this action in the Superior Court of Puerto Rico, alleging that Articles 5.006 and 5.007 authorized only candidates and electors affiliated with the Party to participate in the by-election. Appellants, 10 qualified electors in District 31 who are not affiliated with the Popular Democratic Party, intervened as defendants. On March 20, 1981, the Superior Court entered judgment for the Popular Democratic Party; it ordered the Governor and General Administrator of Elections to limit participation in the by-election to Party members. Jur. St. App. 36a.

A divided Supreme Court of Puerto Rico modified the Superior Court's judgment. It interpreted Articles 5.006 and 5.007 to require a by-election only in the event that the party of the legislator vacating the seat fails to designate a replacement within 60 days after the vacancy occurred; if the party selects a single candidate within the 60-day period, that candidate is "automatically elected to fill the vacancy," rendering a by-election unnecessary. —— P.R.R. ——, —— (1981). The court held further that if the party presents more than one candidate during the 60-day period, a by-election must be conducted in which only party-affiliated candidates may run but in which all qualified electors may vote. In the event no candidate is presented within the 60-day period, candidates affiliated with any party, as well as independent candidates, are permitted to run in the by-election. Because of the delay already occasioned by the litigation, the court permitted appellee only 30 days from the entry of judgment, May 8, 1981, to present a "slate" of candidates to the Commonwealth Election Commission. The court ordered that "[i]f said slate is limited to only one candidate, he shall be certified by the General Administrator of Elections as the person entitled to hold the vacant seat." —— P.R.R., at ——.[3]

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[2] Article 5.006 provides, in pertinent part:

"When a vacancy occurs in the office of a senator or representative elected as an independent candidate for a district, or when a vacancy occurs in the office of a senator or representative for a district, nominated by a party before the fifteen (15) months immediately preceding the date of the following general election, the Governor, with the advice of the [Commonwealth Election] Commission shall, within the thirty (30) days following the date on which the vacancy occurred, call a by-election in such district which shall be held no later than ninety (90) days after the date of the call, and the person elected in such by-election shall hold the office until the term of his predecessor has expired.

"If within sixty (60) days following the date such vacancy arises, the party to which the legislator of the vacant office belonged has not presented a candidate to fill such office, the office shall be deemed to be that of an independent legislator, to the effects of holding the by-election to fill it."

Article 5.007 provides:

"All persons entitled to vote within the geographic district in which the by-election is to be held, pursuant to the call issued by the Governor to such effect, shall vote in a by-election."

The court rejected appellants' contention that this procedure violated the United States Constitution. It noted that the Constitution does not expressly require a fixed method for filling vacancies in a state or commonwealth legislature. The court also held that Puerto Rico's party appointment system serves several "compelling interests," such as ensuring the stability and continuity of the "legislative balance" until the next general election; protecting the "electoral mandate" of the previous election; and reducing "inter-partisan political campaigns to once every four years." —— P.R.R., at ——.

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[3] On March 22, 1981, while the case was pending before the Supreme Court of Puerto Rico, the Popular Democratic Party held a primary election in which only its members were permitted to participate. From a field of 4 candidates, the Party's members selected Juan Corujo Collazo. Pursuant to the Supreme Court's mandate, Corujo's name was presented to the Election Commission, and on July 6, 1981, he was sworn in as the new Representative from District 31.

II

Puerto Rico, in common with many of the States, has adopted means of filling interim vacancies in elective commonwealth offices without the necessity of a full-scale special election.[4] If a vacancy occurs in the office of Governor, it is automatically filled by the Secretary of State, an officer appointed by the Governor. P.R. Const., Art. IV, § 7. Mayoral vacancies and vacancies in the municipal assemblies are filled by appointment upon the recommendation of the political party to which the incumbent belonged. P.R. Laws Ann., Tit. 21, §§ 1611, 1259. Similarly, the Commonwealth Constitution provides that vacancies in the posts of At-Large

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[4] In 22 States, legislative vacancies are filled by appointment, with the appointee serving either until the next general election or until expiration of the term of the previous incumbent. Alaska Stat. Ann. § 15.40.320 *et seq.* (unless term expires or election held before next legislative session convenes); Colo. Rev. Stat. 6, § 1–11–103; Haw. Rev. Stat. §§ 17–3, 17–4; Idaho Code § 59–904A; Ill. Rev. Stat., Ch. 46, ¶ 25–6 (Supp. 1980); Ind. Code § 2-2.1–2–1 *et seq.*; Kan. Stat. Ann. § 25–312; Md. Const., Art. III, § 13; Mont. Code Ann. § 5–2–401 *et seq.*; Neb. Rev. Stat. § 32–1042(3); Nev. Const., Art. IV, § 12 (unless biennial or regular election held between time of vacancy and next legislative session); N.M. Stat. Ann. §§ 2–7–9B, 2–8–9B; N.C. Gen. Stat. § 163–11; Ohio Const., Art. II, § 11; Ore. Rev Stat. §§ 171.051, 171.060 (unless the legislature is not in session; a general election will be held within 90 days; and no special session of the legislature will be convened before such election); S.D. Const., Art. III, § 10; Tenn. Code Ann. § 2–14–201 *et seq.* (if less than 12 months remain before next general election); Utah Code Ann. § 20–1–5 (Supp. 1981); Vt. Stat. Ann., Tit. 17, § 2623 (Supp. 1981); Wash. Const., Amdt. 52, Art. II, § 15; W.Va. Code § 3–10–5; Wyo. Stat. § 22–18–111(a)(ii),(iii). Like Puerto Rico, five of these States—Colorado, Illinois, Indiana, Maryland, and North Carolina—confer the appointment power on the political party to which the previous incumbent belonged. Nine more States—Alaska, Idaho, Montana, Ohio, Oregon, Utah, Washington, West Virginia, and Wyoming—require that the appointee be selected from a list submitted by the political party, or that the appointee be chosen or confirmed by elected officials affiliated with the party. Another two States—Hawaii and Nevada—simply require that the appointee be a member of the party to which his or her predecessor belonged.

Senators and Representatives, see n. 13, *infra*, shall be filled "upon recommendation of the political party to which belonged the Senator or Representative causing the vacancy. . . ." Art. III, § 8. Article 5.006 of the Puerto Rico Electoral Law, as interpreted by the Supreme Court of Puerto Rico in this case, likewise confers on a political party the initial opportunity to appoint an interim replacement for one of its members who vacates a position as a District Senator or Representative. In each case, the appointee serves only until the next regularly-scheduled election.[5]

Appellants' challenge to the procedure mandated by Article 5.006 is essentially two-pronged. Appellants first contend that qualified voters have a federal constitutional right to elect their representatives to the Puerto Rico Legislature, and that vacancies in legislative office therefore must be filled by a special election open to all qualified electors, not by interim appointment of any kind. Alternatively, appellants maintain that even if legislative vacancies may be filled by an interim appointment of the Governor or some other elected official, Puerto Rico's party appointment mechanism impermissibly infringes upon their right of association under the First Amendment and denies them equal protection of the laws.

A

It is not disputed that the fundamental protections of the United States Constitution extend to the inhabitants of Puerto Rico. See *Torres* v. *Puerto Rico*, 442 U. S. 465,

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[5] The current procedure for filling legislative vacancies is similar to that prescribed by a 1938 amendment to Puerto Rico's Organic Act, which remained in effect until Puerto Rico assumed Commonwealth status in 1952. In the 1938 amendment, Congress mandated that vacancies in the Puerto Rico legislature be filled by the Governor "upon the recommendation of the central committee of the political party of which such Senator or Representative was a member." Act of June 1, 1938, ch. 308, § 30, 52 Stat. 595. 48 U. S. C. §§ 891–892 presently provide that vacancies in the elective office of Resident Commissioner to the United States are to be filled by appointment of the Governor with the advice and consent of the Puerto Rico Senate.

469–470 (1979). Cf. *Dorr* v. *United States*, 195 U. S. 138, 148 (1904). In particular, we have held that Puerto Rico is subject to the constitutional guarantees of due process and equal protection of the laws. *Examining Board* v. *Flores de Otero*, 426 U. S. 572, 599–601 (1976); *Calero-Toledo* v. *Pearson Yacht Leasing Co.*, 416 U. S. 663 (1974).[6] We thus think it clear that the voting rights of Puerto Rico citizens are constitutionally protected to the same extent as those of all other citizens of the United States.

At the same time, Puerto Rico, like a State, is an autonomous political entity, "sovereign over matters not ruled by the Constitution." *Calero-Toledo, supra,* at 673. See *Cordova & Simonpietri Ins. Agency Inc.* v. *Chase Manhattan Bank*, 649 F. 2d 36, 39–42 (CA1 1981). The methods by which the people of Puerto Rico and their representatives have chosen to structure the Commonwealth's electoral system are entitled to substantial deference. Moreover, we should accord weight to the Puerto Rico Supreme Court's assessment of the justification and need for particular provisions to fill vacancies caused by the death, resignation, or removal of a member of the legislature. Bearing these considerations in mind, we turn to appellants' constitutional challenges.

B

No provision of the Federal Constitution expressly mandates the procedures that a State or the Commonwealth of Puerto Rico must follow in filling vacancies in its own legislature. Cf. U. S. Const., Art. I, § 2; *id.*, Amdt. 17.[7] Appellants nevertheless maintain that qualified electors have an absolute constitutional right to vote for the members of a state or commonwealth legislature, even when a special election is required for this purpose.[8] However, this Court has often noted that the Constitution "does not confer the right of suffrage upon any one," *Minor* v. *Happersett*, 21 Wall. 162, 178 (1875), and that "the right to vote, *per se*, is not a constitutionally protected right," *San Antonio School District* v. *Rodriguez*, 411 U. S. 1, 35 n. 78 (1973). See *McPherson* v. *Blacker*, 146 U. S. 1, 38–39 (1892). Moreover, we have previously rejected claims that the Constitution compels a fixed method of choosing state or local officers or representatives.

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[6] We have never found it necessary to resolve the precise question whether the guarantee of equal protection is provided to Puerto Ricans under the Equal Protection Clause of the Fourteenth Amendment or the Due Process Clause of the Fifth Amendment. See *Examining Board* v. *Flores de Otero*, 426 U. S. 572, 601 (1976).

[7] With regard to members of the United States House of Representatives, Art. I, § 2, cl. 4 provides:

For example, in *Fortson* v. *Morris*, 385 U. S. 231, 234 (1966), Justice Black, speaking for the Court, stated:

"There is no provision of the United States Constitution

"When Vacancies happen in the Representation from any State, the Executive Authority thereof shall issue Writs of Election to fill such Vacancies."

The Seventeenth Amendment provides:

"When Vacancies happen in the representation of any State in the Senate, the executive authority of such State shall issue writs of election to fill such vacancies: *Provided*, That the legislature of any State may empower the executive thereof to make temporary appointments until the people fill the vacancies by election as the legislature may direct."

[8] The source of this purported right is somewhat unclear. Appellants contend that Art. I, § 2, cl. 1 of the Constitution—which provides that those eligible to vote for members of the United States House of Representatives "shall have the Qualifications requisite for the Electors of the most numerous Branch of the State Legislature"—contemplates that state legislators will be popularly elected. See also U. S. Const., Amdt. 17. Moreover, appellants contend that a popularly elected legislature is an essential element of a "Republican Form of Government," U. S. Const., Art. IV, § 4. See 48 U. S. C. § 731c, requiring Puerto Rico to provide a republican form of government. However, this seems largely irrelevant, since Puerto Rico has in fact established a legislature "whose members shall be elected by direct vote at each general election," P.R. Const., Art. III, § 1. See also *id.*, Art. II, § 2, guaranteeing "equal, direct, and universal suffrage. . . ."

> or any of its amendments which either expressly or impliedly dictates the method a state must use to select its governor."

In *Fortson*, the Court sustained a Georgia constitutional provision empowering the State Legislature to elect a Governor from the two candidates receiving the highest number of votes cast in the general election, in the event neither received a majority. Similarly, in *Sailors* v. *Board of Education*, 387 U. S. 105 (1967), the Court upheld a statute authorizing appointment rather than election of the members of a county school board.[9]

To be sure, when a State or the Commonwealth of Puerto Rico has provided that its representatives be elected, "a citizen has a constitutionally protected right to participate in elections on an equal basis with other citizens in the jurisdiction." *Dunn* v. *Blumstein*, 405 U. S. 330, 336 (1972). See *Kramer* v. *Union Free School District*, 395 U. S. 621, 626–629 (1969); *Gray* v. *Sanders*, 372 U. S. 368, 379–380 (1963). However, the Puerto Rico statute at issue here does not restrict access to the electoral process or afford unequal treatment to different classes of voters or political parties. All qualified voters have an equal opportunity to select a district representative in the general election; and the interim appointment provision applies uniformly to all legislative vacancies, whenever they arise.[10]

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[9] In *Sailors*, we expressly left open the question "whether a State may constitute a local *legislative* body through the appointive rather than the elective process." 387 U. S., at 109–110 (emphasis added). However, we need not consider whether, as urged by appellants, a State or the Commonwealth of Puerto Rico is constitutionally barred from abolishing its elected legislative branch of government; that question is not presented. See n. 8, *supra*.

[10] Appellants contend that Article 5.006 "discriminates" between voters in districts in which a vacancy occurs and those in which the elected Representative or Senator serves out his term, because only the former are de-

In *Valenti* v. *Rockefeller*, 393 U. S. 405 (1969), the Court sustained the authority of the Governor of New York to fill a vacancy in the United States Senate by appointment pending the next regularly scheduled congressional election—in that case, a period of over 29 months.[11] Thus, although most Members of the United States Senate hold office by virtue of popular election, some Members, at any given time, may hold office by virtue of an interim appointment. The Court found nothing invidious or arbitrary in this distinction in *Valenti*, nor do we here. As the three-judge District Court observed in *Valenti*:

> "In this case we are confronted with no fundamental imperfection in the functioning of democracy. No political party or portion of the state's citizens can claim it is permanently disadvantaged . . . or that it lacks effective means of securing legislative reform if the statute is regarded as unsatisfactory. We have, rather, only the un-

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nied the opportunity to be represented by an elected legislator. Obviously, a statute designed to deal with the occasional problem of legislative vacancies will affect only those districts in which vacancies actually arise. However, such a statute is not for this reason rendered invalid under equal protection principles. A vacancy in the legislature is an unexpected, unpredictable event, and a statute providing that all such vacancies be filled by appointment does not have a special impact on any discrete group of voters or candidates. Cf. *Bullock* v. *Carter*, 405 U. S. 134 (1972); *Williams* v. *Rhodes*, 393 U. S. 23 (1968). Appellants' equal protection argument adds nothing to their basic assertion of an absolute constitutional right to elect representatives to a state or commonwealth legislature.

[11] In *Valenti*, the vacancy was created by the death of Senator Robert F. Kennedy on June 6, 1968. Under New York law, since the vacancy arose less than 60 days prior to New York's regular spring primary in an even-numbered year, an election to fill the vacancy would not be held until the general election in the next even-numbered year, *i. e.*, November 1970. The Governor was empowered to make an interim appointment, effective until December 1, 1970. See *Valenti* v. *Rockefeller*, 292 F. Supp. 851, 853 (SDNY 1968) (three judge district court).

usual, temporary, and unfortunate combination of a tragic event and a reasonable statutory scheme." 292 F. Supp. 851, 867 (SDNY 1968).

Valenti, of course, unlike this case, involved an interpretation of the Seventeenth Amendment, which explicitly outlines the procedures for filling vacancies in the United States Senate. See n. 7, *supra*. However, the fact that the Seventeenth Amendment permits a State, if it chooses, to forgo a special election in favor of a temporary appointment to the United States Senate suggests that a State is not constitutionally prohibited from exercising similar latitude with regard to vacancies in its own legislature. We discern nothing in the Federal Constitution that imposes greater constraints on the Commonwealth of Puerto Rico.

The Commonwealth's choice to fill legislative vacancies by appointment rather than by a full-scale special election may have some effect on the right of its citizens to elect the members of the Puerto Rico legislature; however, the effect is minimal, and like that in *Valenti*, it does not fall disproportionately on any discrete group of voters, candidates, or political parties. See n. 10, *supra*. Moreover, the interim appointment system plainly serves the legitimate purpose of ensuring that vacancies are filled promptly, without necessity of the expense and inconvenience of a special election. The Constitution does not preclude this practical and widely accepted means of addressing an infrequent problem.

C

Puerto Rico's appointment mechanism is not rendered constitutionally defective by virtue of the fact that the interim appointment power is given to the political party with which the previous incumbent was affiliated. Appellants maintain that the power to make interim appointments must be vested in an elected official, such as the Governor of the Commonwealth, so that the appointments will have "the legitimacy of derivative voter approval and control." Reply Brief for Appellants 15. However, that such control may often be largely illusory is illustrated by this case, where the Governor and the incumbent belonged to different parties. The Puerto Rico Legislature could reasonably conclude that appointment by the previous incumbent's political party would more fairly reflect the will of the voters than appointment by the Governor or some other elected official.[12]

The Supreme Court of Puerto Rico held that party appointment was a legitimate mechanism serving to protect the mandate of the preceding election and to preserve the "legislative balance" until the next general election is held. Such protection is particularly important in light of Puerto Rico's special interest in ensuring minority representation in its legislature.[13] See *Cintron Garcia* v. *Romero Barcelo*, 671 F. 2d 1,

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[12] See *Cintron Garcia* v. *Romero Barcelo*, 671 F. 2d 1, 6 (CA1 1982): "One might argue, as a matter of form, that appointment by a governor is indeed more 'democratic' because the governor is himself elected. Yet in practice this is not likely to be so when the governor and former representative are of different parties. In that case the party difference is likely to produce successors of different parties. In such circumstances, we see how the framers of a state constitution might conclude that party selection is more likely to reflect the will of the voters than selection by the governor, for it was the former representative's party, not that of the governor, that won the prior seat. Such a judgment, reflecting a knowledge of political practice, seems perfectly consistent with the basic democratic role of the modern political party—translating the individual wills of myriad voters into a practically achievable program administered by a government that can be held responsible for its performance at the polls."

[13] Two devices in Puerto Rico's Constitution ensure representation of minority parties in the Puerto Rico Legislative Assembly. First, 11 of 27 Senators and 11 of 51 Representatives are elected "at-large," and each voter may vote for only one candidate for Senator or Representative At-Large. Art. III, § 3. Second, if any one party elects more than two-thirds of the members of either house of the legislature, the number of members in that house is increased by declaring elected a sufficient number of minority-party candidates to bring the total number of minority-party members to 9 in the Senate and to 17 in the House. Art. III, § 7.

6–7 (CA1 1982). It was thus not unreasonable for the Puerto Rico legislature, in establishing an appointment system for filling legislative vacancies, to make provision for continuity of party representation. Cf. *Kaelin* v. *Warden*, 334 F. Supp. 602, 607–608 (ED Pa. 1971) (three judge district court).[14] Absent some clear constitutional limitation, Puerto Rico is free to structure its political system to meet its "special concerns and political circumstances," *Cintron Garcia*, *supra*, at 7.

Finally, appellants argue that their rights of association and equal protection of the laws were violated by their exclusion, based solely upon their party affiliation, from the Party-sponsored election held to select Muniz' successor, see n. 3, *supra*. Cf. *Branti* v. *Finkel*, 445 U. S. 507 (1980). However, appellants' argument misconceives the nature of the election held in this case. Puerto Rico law authorized the Popular Democratic Party to designate an interim replacement to fill Muniz' seat. The Party was entitled to adopt its own procedures to select this replacement; it was not required to include non-members in what can be analogized to a party primary election. Cf. *Democratic Party* v. *Wisconsin ex rel. La Follette*, 450 U. S. 107 (1981); *Cousins* v. *Wigoda*, 419 U. S. 477 (1975). Appellants' exclusion from this election did not violate their rights of association, nor did it deprive them of equal protection of the laws.

Appellees maintain that "the Commonwealth's unique guarantee of minority party representation . . . is and has been particularly important in Puerto Rico, far beyond its importance in any State of the Union, in order to provide a democratic forum and an outlet for the radically different views of the various political parties as to the ultimate status of Puerto Rico. . . ." Brief for Appellees 14.

[14] Puerto Rico is no sense unique in maintaining continuity of party representation between elections; 16 States have chosen to require that legislative vacancies be filled by appointment of a person affiliated with the same party as the previous incumbent, or by designation of that party, see n. 4, *supra*.

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III

We hold that the mechanism adopted by the Puerto Rico legislature for filling legislative vacancies is not foreclosed by the Federal Constitution. Accordingly, the judgment of the Supreme Court of Puerto Rico is

Affirmed.

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(Slip Opinion)

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SUPREME COURT OF THE UNITED STATES

Syllabus

GREENE ET AL. *v.* LINDSEY ET AL.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 81-341. Argued February 23, 1982—Decided May 17, 1982

A Kentucky statute permits service of process in forcible entry and detainer actions to be made by posting a summons "in a conspicuous place on the premises," if the defendant or a member of the defendant's family over 16 years of age cannot be found on the premises. Service of process under this statute was made on appellee tenants in a public housing project by posting summonses on the doors of each of their apartments. Appellees claim that they never saw the summonses and did not know of the eviction proceedings until they were served with writs of possession, executed after default judgments had been entered against them and their opportunity for appeal had lapsed. They then filed a class action in Federal District Court against appellant public officials, seeking declaratory and injunctive relief under 42 U. S. C. § 1983 and alleging that the notice procedures employed violated the Due Process Clause of the Fourteenth Amendment. The District Court granted summary judgment for appellants, holding that such notice procedures did not deny due process. The Court of Appeals reversed.

Held: In failing to afford appellees adequate notice of the proceedings against them before issuing final orders of eviction, the State deprived them of property without due process of law required by the Fourteenth Amendment. Pp. 4–11.

(a) "An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is *notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action* and afford them an opportunity to present their objections." *Mullane* v. *Central Hanover Bank & Trust Co.*, 339 U. S. 306, 314. Pp. 4–5.

(b) In light of the fact that appellees were deprived of a significant interest in property and, indeed, of the right to continued residence in

Ju 6. 8/b:

their homes, it does not suffice to recite that because the action was *in rem*, it was only necessary to serve notice "upon the thing itself." The sufficiency of the notice must be tested with reference to its ability to inform people of the pendency of proceedings that affect their interests. Pp. 5-6.

(c) Notices posted on the doors of tenants' apartments were "not infrequently" removed before they could be seen by the tenants. Whatever the efficacy of posting notice on a door of a person's home in many cases, it is clear that, in the circumstances of this case, merely posting notice on the apartment door did not satisfy minimum standards of due process. Pp. 6-9.

(d) Neither the statute nor the practice of process servers provides for even a second attempt at personal service. The failure to effect personal service on the first visit hardly suggests that the tenant has abandoned his interest in the apartment such that mere *pro forma* notice might be constitutionally adequate. Pp. 9-10.

(e) Notice by mail in the circumstances of this case would go a long way toward providing the constitutionally required assurance that the State has not allowed its power to be invoked against a person who has had no opportunity to present a defense. P. 10.

649 F. 2d 425, affirmed.

BRENNAN, J., delivered the opinion of the Court, in which WHITE, MARSHALL, BLACKMUN, POWELL and STEVENS, JJ., joined. O'CONNOR, J., filed a dissenting opinion, in which BURGER, C. J., and REHNQUIST, J., joined.

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SUPREME COURT OF THE UNITED STATES

No. 81-341

JOSEPH GREENE, ET AL., APPELLANTS *v.* LINNIE LINDSEY, ET AL.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

[May 17, 1982]

JUSTICE BRENNAN delivered the opinion of the Court.

A Kentucky statute provides that in forcible entry and detainer actions, service of process may be made under certain circumstances by posting a summons on the door of a tenant's apartment. The question presented is whether this statute, as applied to tenants in a public housing project, fails to afford those tenants the notice of proceedings initiated against them required by the Due Process Clause of the Fourteenth Amendment.

I

Appellees Linnie Lindsey, Barbara Hodgens, and Pamela Ray are tenants in a Louisville, Ky. housing project. Appellants are the Sheriff of Jefferson Co., Ky., and certain unnamed deputy sheriffs charged with responsibility for serving process in forcible entry and detainer actions. In 1975, the Housing Authority of Louisville initiated detainer actions against each of appellees, seeking repossession of their apartments. Service of process was made pursuant to the Ky. Rev. Stat. § 454.030, which states:

> "If the officer directed to serve notice on the defendant in forcible entry or detainer proceedings cannot find the defendant on the premises mentioned in the writ, he may explain and leave a copy of the notice with any

> member of the defendant's familty thereon over sixteen years of age, and if no such person is found he may serve the notice by posting a copy thereof in a conspicuous place on the premises. The notice shall state the time and place of meeting of the court."

In each instance, notice took the form of posting a copy of the Writ of Forcible Entry and Detainer on the door of the tenant's apartment.[1] Appellees claim never to have seen these posted summonses; they state that they did not learn of the eviction proceedings until they were served with writs of possession, executed after default judgments had been entered against them, and after their opportunity for appeal had lapsed.

Thus without recourse in the state courts, appellees filed this suit as a class action in the United States District Court for the Western District of Kentucky, seeking declaratory and injunctive relief under 42 U. S. C. § 1983. They claimed that the notice procedure employed as a predicate to these eviction proceedings did not satisfy the minimum standards of constitutionally adequate notice described in *Mullane* v. *Central Hanover Bank & Trust Co.*, 339 U. S. 306 (1950), and that the Commonwealth of Kentucky had thus failed to afford them the due process of law guaranteed by the Fourteenth Amendment. Named as defendants were the Housing Authority of Louisville, several public officials charged with responsibility over particular Louisville public housing projects, Joseph Green, the Jefferson County Sheriff, and certain known and unknown deputy sheriffs.

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[1] "Posting" refers to the practice of placing the Writ on the property by use of thumbtack, adhesive tape or other means. App. 74, 77 (deposition of process servers). Appellants describe the usual method of effecting service pursuant to § 454.030 in the following terms:

"The officer of the court who is charged with serving notice in a forcible entry and detainer action, usually a Jefferson County Deputy Sheriff, takes the following steps in notifying a tenant. First, the officer goes to the apartment in an effort to effectuate personal in-hand service. Second, if the named tenant is absent or will not appear at the door, personal in-hand service is made on any member of the tenant's family over sixteen years of age. Finally, if no one answers the door, a copy of the notice is posted on the premises, usually the door." Brief of Appellants 3.

On cross-motions for summary judgment, the District Court granted judgment for appellants. In an unreported opinion, the court noted that some seventy years earlier, in *Weber* v. *Grand Lodge of Kentucky, F. & A. M.*, 169 F. 522 (1909), the Court of Appeals for the Sixth Circuit had held that constructive notice by posting on the door of a building, pursuant to the predecessor statute to § 454.030, provided an adequate constitutional basis upon which to commence an eviction action, on the ground that it was reasonable for the State to presume that a notice posted on the door of the building in dispute would give the tenant actual notice in time to contest the action. Although the District Court recognized that "conditions have changed since the decision in *Weber* . . . and . . . that there is undisputed testimony in this case that notices posted on the apartment doors of tenants are often removed by other tenants," App. 41–42, the court nevertheless concluded that the procedures employed did not deny due process in light of the fact "that posting only comes into play after the officer directed to serve notice cannot find the defendant on the premises," *id.*, at 42.

The Court of Appeals for the Sixth Circuit reversed the grant of summary judgment in favor of appellants and remanded the case for further proceedings. 649 F. 2d 425 (1981). Acknowledging that its decision in *Weber* directed a contrary result, the Court of Appeals examined the doctrinal basis of that decision, and concluded that it rested in part on distinctions between actions *in rem* and actions *in personam* that had been drawn in cases such as *Pennoyer* v. *Neff*, 95 U. S. 714 (1877), *Huling* v. *Kaw Valley Railway*, 130 U. S. 559 (1889), *Arndt* v. *Griggs*, 134 U. S. 316 (1890); *Ballard* v. *Hunter*, 204 U. S. 241 (1907), and *Longyear* v. *Toolan*, 209 U. S. 414 (1908), and that had been substantially undercut by intervening decisions of this Court. In overruling *Weber*, the Court of Appeals cited *Internat. Shoe Co.* v. *Washington*, 326 U. S. 310 (1945), *Mullane, supra*, and *Shaffer* v. *Heitner*, 433 U. S. 186 (1977), as cases calling for a more realistic appraisal of the adequacy of process provided by the State. Turning to the circumstances of this case and the procedures contemplated by § 454.030, the Court of Appeals noted that while there may have been "a time when posting provided a surer means of giving notice than did mailing, [t]hat time has passed. The uncontradicted testimony by process servers themselves that posted summonses are not infrequently removed by persons other than those served constitutes effective confirmation of the conclusion that notice by posting 'is not reasonably calculated to reach those who could easily be informed by other means at hand,'" 649 F. 2d, at 428, quoting *Mullane, supra*, at 319.[2] The court held, therefore, that the notice provided pursuant to § 454.030 was constitutionally deficient. We noted probable jurisdiction, —— U. S. —— (1981), and now affirm.

II

A

"The fundamental requisite of due process of law is the opportunity to be heard." *Grannis* v. *Ordean*, 234 U. S. 385, 394 (1914). And the "right to be heard has little reality or worth unless one is informed that the matter is pending and can choose for himself whether to appear or default, acquiesce or contest," *Mullane, supra*, 339 U. S., at 314. Personal service guarantees actual notice of the pendency of a legal action; it thus presents the ideal circumstance under which to commence legal proceedings against a person, and has traditionally been deemed necessary in actions styled *in personam*. *McDonald* v. *Mabee*, 243 U. S. 90, 92 (1917). Nevertheless, certain less rigorous notice procedures have enjoyed substantial acceptance throughout our legal history; in light of this history and the practical obstacles to providing personal service in every instance, we have allowed judicial proceedings to be prosecuted in some situations on the basis of procedures that do not carry with them the same certainty of actual notice that inheres in personal service. But we have also clearly recognized that the Due Process Clause does prescribe a constitutional minimum: "An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is *notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action* and afford them an opportunity to present their objections." *Mullane*, 339 U. S., at 314 (emphasis added). It is against this standard that we evaluate the procedures employed in this case.

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[2] The Court of Appeals concluded that "[r]equiring Kentucky to provide notice by mail when personal service proves infeasible will not be overly burdensome. The cost will be minimal, and the state's conceded interest in providing a summary procedure for settlement of landlord-tenant disputes will not be seriously circumscribed." 649 F. 2d, at 428. The court then noted with approval the provisions of the New York counterpart of § 454.030, which provides that when notice is served by posting, a copy of the petition must be sent by registered or certified mail within a day of the posting. *Ibid.*, citing *Velazquez* v. *Thompson*, 451 F. 2d 202, 205 (CA2 1971).

B

Appellants argue that because a forcible entry and detainer action is an action *in rem*, notice by posting is *ipso facto* constitutionally adequate. Appellees concede that posting has traditionally been deemed appropriate for *in rem* proceedings, but argue that detainer actions can now encompass more than the simple issue of the tenant's continued right to possession, and that they therefore require the more exacting forms of notice customarily provided for proceedings *in personam*. Appellants counter by conceding that if the particular detainer proceeding was one in which the landlord sought to recover past due rent, personal service would be required by Kentucky law, but argue that such claims are unusual in such proceedings, and that in the cases before us the landlord claimed only a right to recover possession. Tr. of Oral Arg. 19–21.

As in *Mullane*, we decline to resolve the constitutional question based upon the determination whether the particular action is more properly characterized as one *in rem* or *in personam*. 339 U. S., at 312. See *Shaffer* v. *Heitner*, 433 U. S., at 206. That is not to say that the nature of the action has no bearing on a constitutional assessment of the reasonableness of the procedures employed. The character of the action reflects the extent to which the court purports to extend its power, and thus may roughly describe the scope of potential adverse consequences to the person claiming a right to more effective notice. But "[a]ll proceedings, like all rights, are really against persons."[3] In this case, appellees have been deprived of a significant interest in property: indeed, of the right to continued residence in their homes.[4] In light of this deprivation, it will not suffice to recite that because the action is *in rem*, it is only necessary to serve notice "upon the thing itself."[5] The sufficiency of notice must be tested with reference to its ability to inform people of the pendency of proceedings that affect their interests. In arriving at the constitutional assessment, we look to the realities of the case before us: In determining the constitutionality of a procedure established by the State to provide notice in a particular class of cases, "its effect must be judged in the light of its practical application to the affairs of men as they are ordinarily conducted." *North Laramie Land Co.* v. *Hoffman*, 268 U. S. 276, 283 (1925).

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[3] *Shaffer* v. *Heitner*, 433 U. S., at 207, n. 22, quoting *Tyler* v. *Court of Registration*, 175 Mass. 71, 76, 55 N.E. 812, 814 (Holmes, C. J.), appeal dismissed, 179 U. S. 405 (1900).

[4] The dissent directs our attention to the "nature and purpose," of Kentucky's forcible entry and detainer action. *Post*, at 1. Such proceedings are designed to offer an expeditious means of determining who is entitled to retain possession of an apartment. But that hardly explains why we may dispense with the constitutional requirement of adequate notice. After all, detainer proceedings, while in some sense "summary," are *proceedings* in which issues of fact and law are to be resolved, and important interests in property determined. We can agree with the dissent's observation that the "means chosen for making service of process . . . must be prompt and certain." *Post*, at 2. But it is difficult to see how, from the perspective of the landlord, any of the likely supplements to the form of service currently provided under § 454.030 will render the procedure markedly less prompt or certain. More significantly, *from the perspective of the tenant*, it is difficult to see how a means of serving process that fails to afford actual notice in a "not insubstantial" number of cases can be deemed *either* prompt or certain.

It is, of course, reasonable to assume that a property owner will maintain superintendence of his property, and to presume that actions physically disturbing his holdings will come to his attention. See *Mullane, supra*, at 316.[6] The frequent restatement of this rule impresses upon the property owner the fact that a failure to maintain watch over his property may have significant legal consequences for him, providing a spur to his attentiveness, and a consequent reinforcement to the empirical foundation of the principle. Upon this understanding, a State may in turn conclude that in most cases, the secure posting of a notice on the property of a person is likely to offer that property owner sufficient warning of the pendency of proceedings possibly affecting his interests.

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[5] *The Mary*, 9 Cranch 126, 144 (1815).

[6] As we noted in *Mullane, supra:*

"The ways of an owner with tangible property are such that he usually arranges means to learn of any direct attack upon his possessory or proprietary rights. Hence, . . . entry upon real estate in the name of law may reasonably be expected to come promptly to the owner's attention. . . . A state may indulge the assumption that one who has left tangible property in the state either has abandoned it, in which case proceedings against it deprive him of nothing, . . . or that he has left some caretaker under a duty to let him know that it is being jeopardized." 339 U. S., at 316.

Of course, the *Mullane* discussion of the special notice rules with respect to proceedings affecting property ownership focused on the forms of notice that might be appropriate as a supplement to the direct disturbance of the property itself. But where the State has reason to believe the premises to be occupied or under the charge of a caretaker, notice posted on the premises, if sufficiently apparent, is itself a form of disturbance, likely to come to the attention of the occupants or the caretaker.

The empirical basis of the presumption that notice posted upon property is adequate to alert the owner or occupant of property of the pendency of legal proceedings would appear to make the presumption particularly well-founded where notice is posted at a residence. With respect to claims affecting the continued possession of that residence, the application of this presumption seems particularly apt: If the tenant has a continuing interest in maintaining possession of the property for his use and occupancy, he might reasonably be expected to frequent the premises; if he no longer occupies the premises, then the injury that might result from his not having recieved actual notice as a consequence of the posted notice is reduced. Short of providing personal service, then, posting notice on the door of a person's home would, in many or perhaps most instances, constitute not only a constitutionally acceptable means of service, but indeed a singularly appropriate and effective way of ensuring that a person who cannot conveniently be served personally is actually apprised of proceedings against him.

But whatever the efficacy of posting in many cases, it is clear that, in the circumstances of this case, merely posting notice on an apartment door does not satisfy minimum standards of due process. In a significant number of instances, reliance on posting pursuant to the provisions of § 454.030 results in a failure to provide actual notice to the tenant concerned. Indeed, appellees claim to have suffered precisely such a failure of actual notice. As the process servers were well aware, notices posted on apartment doors in the area where these tenants lived were "not infrequently" removed by children or other tenants before they could have their intended effect.[7] Under these conditions, notice by posting on the apartment door cannot be considered a "reliable means of acquainting interested parties of the fact that their rights are before the courts." *Mullane, supra,* at 315.

Of course, the reasonableness of the notice provided must be tested with reference to the existence of "feasible and customary" alternatives and supplements to the form of notice chosen. *Ibid.* In this connnection, we reject appellants' characterization of the procedure contemplated by § 454.030 as one in which "'posting' is used as a method of service only as a last resort." Brief for Appellants 7. To be sure, the statute requires the officer serving notice to make a visit to the tenant's home and to attempt to serve the writ personally on the tenant or some member of his family. But if no one is at home at the time of that visit, as is apparently true in a "good percentage" of cases[8], posting follows forthwith. Neither the statute, nor the practice of the process servers, makes provision for even a second attempt at personal service, perhaps at some time of day when the tenant is more likely to be at home. The failure to effect personal service on the first visit hardly suggests that the tenant has abandoned his interest in the apartment such that mere *pro forma* notice might be held constitutionally adequate. Cf. *Mullane, supra,* at 317–318.

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[7] The depositions before the district court included the following statements by the process servers:

"The children—we had problems with children. They would take [the Writs] off. They never took them off when we were present, but we, you know, assume—the Housing Authority told us that they would take them off, so we always put them up high." App. 74.

. . . .

"Q. Did you ever see kids pulling them off?
A. Yes.
Q. You did?
A. Uh-huh.
Q. Did you see many?
A. No, not too many. I did see it in one place over there.
Q. Where was that?
A. Village West.
Q. How many times did you see that happen?
A. Well, probably a couple of times." App. 80.

. . . .

"Q. Were you aware of there being any problem with children ripping the Writs off?
A. Oh, we had plenty of trouble.
Q. You had trouble?
A. With kids, yeah. Yeah.
Q. Did you ever see kids ripping them off?
A. Yeah. I have seen them take them off of the door and I would go back and tell them to put it back. They don't know. They didn't know. They just—

. . . .

Q. Were there any particular places where you saw kids ripping them off the doors?
A. Well most of that was in Village West." App. 82.

As noted by the Court of Appeals, and as we noted in *Mullane,* the mails provide an "efficient and inexpensive means of communication," *id.,* at 319, upon which prudent men will ordinarily rely in the conduct of important affairs, *id.,* at 319–320. Notice by mail in the circumstances of this case would surely go a long way toward providing the constitutionally required assurance that the State has not allowed its power to be invoked against a person who has had no opportunity to present a defense despite a continuing interest in the resolution of the controversy.[9] Particularly where the subject matter of the action also happens to be the mailing address of the defendant, and where personal service is ineffectual, notice by mail may reasonably be relied upon to provide interested persons with actual notice of judicial proceedings. We need not go so far as to insist that in order to "dispense with personal service the substitute that is most likely to reach the defendant is the least that ought to be required," *McDonald* v. *Mabee*, *supra*, 243 U. S., at 92, in order to recognize that where an inexpensive and efficient mechanism such as mail service is available to enhance the reliability of an otherwise unreliable notice procedure, the State's continued exclusive reliance on an ineffective means of service is not notice "reasonably calculated to reach those who could easily be informed by other means at hand." *Mullane*, *supra*, at 319.[10]

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[8] App. 76 (deposition of process server).

[9] The dissent apparently wishes to dispute the District Court's finding that "notices posted on apartment doors are often removed," and further questions our reliance on the observation in *Mullane* that the mails are a reliable means of communication—in light of its own observation that "unattended mailboxes are subject to plunder." *Post,* at 4. The dissent misconstrues the constitutional standard. In light of the findings of the courts below, we hold only that posted notice pursuant to § 454.030 is constitutionally inadequate. It is not our responsibility to prescribe the form of service that the Commonwealth should adopt. But even conceding that proc-

III

We conclude that in failing to afford appellees adequate notice of the proceedings against them before issuing final orders of eviction, the State has deprived them of property without the due process of law required by the Fourteenth Amendment. The judgment of the Court of Appeals is therefore

Affirmed.

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ess served by mail is far from the ideal means of providing the notice the Due Process Clause of the Fourteenth Amendment requires, we have no hesitation in concluding that posted service *accompanied by* mail service, is constitutionally preferrable to posted service alone.

[10] "Where the names and post-office addresses of those affected by a proceeding are at hand, the reasons disappear for resort to means less likely than the mails to apprise them of its pendency." 339 U. S., at 318. See *Schroeder* v. *City of New York*, 371 U. S. 208, 213 (1962).

[illegible]

[illegible]

[illegible]

SUPREME COURT OF THE UNITED STATES

No. 81-341

JOSEPH GREENE ET AL., APPELLANTS v. LINNIE LINDSEY ET AL.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

[May 17, 1982]

JUSTICE O'CONNOR, with whom THE CHIEF JUSTICE and JUSTICE REHNQUIST join, dissenting:

Today, the Court holds that the Constitution prefers the use of the postal service to posted notice. The Court reaches this conclusion despite the total absence of any evidence in the record regarding the speed and reliability of the mails. The sole ground for the Court's result is the scant and conflicting testimony of a handful of process servers in Kentucky. On this flimsy basis, the Court confidently overturns the work of the Kentucky legislature and, by implication, that of at least ten other States. I must respectfully dissent.

At a minimum, the Fourteenth Amendment requires "notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action." *Mullane* v. *Central Hanover Tr. Co.*, 339 U. S. 306, 314 (1950). The question before the Court is whether the notice provided by Kentucky's statute meets this standard. In answering that question, the first "circumstances" to be considered are the nature and purpose of the action for which notice is required.

Kentucky's forcible entry and detainer action is a summary proceeding for quickly determining whether or not a landlord has the right to immediate possession of leased premises and, if so, for enabling the landlord speedily to obtain the property from the person in wrongful possession. Ky. Rev. Stat. §§383.200, 383.210. As this Court has recognized, such circumstances call for special procedures:

> "There are unique factual and legal characteristics of the landlord-tenant relationship that justify special statutory treatment inapplicable to other litigants. The tenant is, by definition, in possession of the property of the landlord; unless a judicially supervised mechanism is provided for what would otherwise be swift repossession by the landlord himself, the tenant would be able to deny the landlord the rights of income incident to ownership by refusing to pay rent and by preventing sale or rental to someone else. Many expenses of the landlord continue to accrue whether a tenant pays his rent or not. Speedy adjudication is desirable to prevent subjecting the landlord to undeserved economic loss and the tenant to unmerited harassment and dispossession when his lease or rental agreement gives him the right to peaceful and undisturbed possession of the property." *Lindsey* v. *Normet*, 405 U. S. 56, 72–73 (1972).

The means chosen for making service of process, therefore, must be prompt and certain, for otherwise the principal purpose of a forcible entry and detainer action could be thwarted before the judicial proceedings even began.

The Kentucky statute meets this need. It directs the process server to attempt personal service on the tenant at his residence. Ky. Rev. Stat. § 454.030. If the process server cannot find the tenant on the premises, the statute directs the server to explain and leave a copy of the notice with a family member over the age of 16. *Ibid.* If both of these attempts fail, Kentucky authorizes the server, as a last resort, to post a copy of the notice in a conspicuous place on the premises. *Ibid.*

As the Court recognizes, notice procedures like Kentucky's, though "less rigorous" than mandatory personal service, nonetheless "have enjoyed substantial acceptance throughout our legal history." *Ante,* at 5. The weight of historical precedent is reinforced by the collective wisdom of the legislatures of the at least 11 States authorizing notice in summary eviction proceedings solely by posting or by leaving the notice at the tenant's residence.[1] The Court itself acknowledges that "posting notice on the door of a person's home would, in many or perhaps most instances, constitute . . . a singularly appropriate and effective way of ensuring that a person who cannot conveniently be served personally is actually apprised of proceedings against him." *Ante*, at 8.

The Court nonetheless rejects these established procedures as unconstitutional, though it does not cite a single case, other than the decision below, supporting its position that notice by posting is constitutionally inadequate in summary eviction proceedings. Instead, the Court relies solely on the deposition testimony of a few Kentucky process servers.

The testimony is hardly compelling. For example, one process server, Mr. S. Carter Bacon, reported having seen children in the Village West housing development pull down posted writs "probably a couple of times." App. 80; App. in No. 79-3477 (CA6), p. 103. The Court neglects to mention, however, that another process server, Mr. Gilbert Brutscher, cast doubt on Mr. Bacon's testimony by stating:

> "I had been warned beforehand that, by Mr. Bacon, Carter Bacon, that he suspected—he wasn't certain, but he suspected that on some occasions the Writs had been torn off the doors by kids. This is what he told me. Whether that is true or not, I don't know. And I don't think that he observed that, and the six months I was

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[1] See Ala. Code §§ 6-6-332, 35-9-82; Colo. Rev. Stat. § 13-40-112; Fla. Stat. § 48.183; Kan. Stat. Ann. § 61-1805; Ky. Rev. Stat. § 454.030; La. Code of Civ. Proc. Ann., Art. 4703; Miss. Code Ann. § 89-7-33; Neb. Rev. Stat. § 25-508; N.H. Rev. Stat. Ann. §§ 510:2, 540:5; N.C. Gen. Stat. § 42-29; W. Va. Code § 56-2-1, W. Va. Rule of Civ. Proc. 4(d)(1).

> working at it there was no occasion where I saw anyone tear the Writs off of the door." App. in No. 79–3477 (CA6), pp. 112–113.

The Court also neglects to mention that another process server testified that in order to avoid problems with children, the process servers "always put [the writs] up high. So we never had any problems with that." App. 74. Corroborating this testimony, moreover, is the testimony of yet another process server, who asserted: "we always try to put the paper up above where, a, say a small child can't reach it." App. in No. 79–3477 (CA6), p. 74. This server, asked whether he had "had complaints about small children ripping them off," answered that he had never had a complaint and had never seen a child try to rip a notice off. *Ibid.*

Plainly, such conflicting testimony falls well short of what this Court should require before rushing to scrap Kentucky's considered legislative judgment that, as a last resort, posted notice is an appropriate form of service of process for forcible entry and detainer actions.

The Court, however, holds that notice via the mails is so far superior to posted notice that the difference is of constitutional dimension.[2] How the Court reaches this judgment remains a mystery, especially since the Court is unable, on the present record, to evaluate the risks that notice mailed to public housing projects might fail due to loss, misdelivery, lengthy delay, or theft. Furthermore, the advantages of the mails over posting, if any, are far from obvious. It is no secret, after all, that unattended mailboxes are subject to plunder by thieves. Moreover, unlike the use of the mails, posting notice at least gives assurance that the notice has gotten as far as the tenant's door.

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[2] The Court gives lip service to the principle that "[i]t is not our responsibility to prescribe the form of service that [Kentucky] should adopt," *ante*, at 10, n. 9, but then goes on to do just that, first by explaining to the state legislature that, unlike notice by posting, notice by mail "would surely go a long way toward" satisfying the Court, *ante*, at 10, and then by remarking that, in the Court's view, the combination of posted service and mail service would be "constitutionally preferable" to posted service alone, *ante*, at 10–11, n. 9.

In sum, the Court has chosen to overturn Kentucky's procedures on the basis of a wholly inadequate record. In so doing, the Court apparently indulges a presumption that the state legislation challenged here is unconstitutional until proven otherwise. Regrettably, the Court seems to forget that we have long since discarded the concept that "due process authorizes courts to hold laws unconstitutional when they believe the legislature has acted unwisely." *Ferguson* v. *Skrupa*, 372 U. S. 726, 730 (1963). I respectfully dissent.

All issues available have been filmed. Unfortunately, any scattered missing issues are no longer available.

READEX
FICHE

981/81-389

(Slip Opinion)

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Lumber Co.*, 200 U. S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

UNION LABOR LIFE INSURANCE CO. *v.* PIRENO

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

No. 31–389. Argued April 27, 1982—Decided June 28, 1982*

As required by New York law, petitioner Union Labor Life Insurance Co. (ULL) issues health insurance policies covering certain policyholder claims for chiropractic treatments. Some ULL policies limit the company's liability to "reasonable" charges for "necessary" medical care and services. In order to determine whether particular chiropractors' treatments and fees were necessary and reasonable, ULL arranged with petitioner New York State Chiropractic Association (NYSCA), a professional association of chiropractors, to use the advice of its Peer Review Committee, which was established primarily to aid insurers in evaluating claims for chiropractic treatments, and which is composed of ten practicing New York chiropractors. Respondent is a licensed chiropractor practicing in New York. On a number of occasions ULL referred his treatments of ULL policyholders, and his charges for those treatments, to the Committee for review. The Committee sometimes concluded that respondent's treatments were unnecessary or his charges unreasonable. Respondent brought suit in Federal District Court, alleging that petitioners' peer review practices violated § 1 of the Sherman Act because petitioners had used the Committee as the vehicle for their conspiracy to fix the prices that chiropractors would be permitted to charge for their services. The District Court granted petitioners' motion for summary judgment dismissing respondent's complaint, on the ground that ULL's use of NYSCA's Peer Review Committee was exempted from antitrust scrutiny by § 2(b) of the McCarran-Ferguson Act, which applies to the "business of insurance." The Court of Appeals reversed and remanded the action for further proceedings.

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*Together with No. 81–390, *New York State Chiropractic Assn.* v. *Pireno*, also on certiorari to the same court.

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Held: ULL's use of NYSCA's Peer Review Committee does not constitute the "business of insurance" within the meaning of § 2(b) of the McCarran-Ferguson Act, and thus is not exempt from antitrust scrutiny. *Group Life & Health Ins. Co.* v. *Royal Drug Co.*, 440 U. S. 205, controlling. Pp. 5–13.

(a) There are three criteria relevant in determining whether a particular practice is part of the "business of insurance" exempted from the antitrust laws by § 2(b): first, whether the practice has the effect of transferring or spreading a policyholder's risk; second, whether the practice is an integral part of the policy relationship between the insurer and the insured; and third, whether the practice is limited to entities within the insurance industry. *Royal Drug Co., supra.* Pp. 5–9.

(b) With regard to the first criterion, petitioners' arrangement plays no part in the spreading and underwriting of a policyholder's risk, because it is logically and temporally unconnected to the contract entered by the policyholder and ULL, which was the actual risk-transferring event. As to the second criterion, ULL's use of NYSCA's Peer Review Committee is distinct from ULL's contracts with its policyholders, and constitutes a separate arrangement between the insurer and third parties not engaged in the business of insurance. Nor does the challenged arrangement satisfy this criterion on the asserted ground that it directly involves the "interpretation" and "enforcement" of the insurance contract, because ULL's procedure for deciding whether claims are covered is a matter of indifference to the policyholder, whose only concern is *whether* his claim is paid, not *why* it is paid. As respects the third criterion, it may be assumed that the challenged arrangement need not be denied the § 2(b) exemption *solely* because it involves parties outside the insurance industry—namely, practicing chiropractors serving on the Peer Review Committee. But such arrangements can hardly be said to lie at the center of the legislative concern underlying § 2(b), which was with the protection of *intra*-industry cooperation in the underwriting of risks. More importantly, such arrangements may prove contrary to the spirit as well as the letter of § 2(b), because they have the potential to restrain competition in noninsurance markets. Pp. 9–13.

650 F. 2d 387, affirmed.

BRENNAN, J., delivered the opinion of the Court, in which WHITE, MARSHALL, BLACKMUN, POWELL, and STEVENS, JJ., joined. REHNQUIST, J., filed a dissenting opinion, in which BURGER, C. J., and O'CONNOR, J., joined.

NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D.C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

SUPREME COURT OF THE UNITED STATES

Nos. 81–389 AND 81—390

UNION LABOR LIFE INSURANCE COMPANY,
PETITIONER,
81–389 *v.*
A. ALEXANDER PIRENO

NEW YORK STATE CHIROPRACTIC ASSOCIATION,
PETITIONER,
81–390 *v.*
A. ALEXANDER PIRENO

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

[June 28, 1982]

JUSTICE BRENNAN delivered the opinion of the Court.

In this case we consider an alleged conspiracy to eliminate price competition among chiropractors, by means of a "peer review committee" that advised an insurance company whether particular chiropractors' treatments and fees were "necessary" and "reasonable." The question presented is whether the alleged conspiracy is exempt from federal antitrust laws as part of the "business of insurance" within the meaning of the McCarran-Ferguson Act.[1]

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[1] 59 Stat. 33, as amended, 15 U. S. C. §§ 1011–1015. The Act provides in relevant part:

"2(a) The business of insurance, and every person engaged therein, shall be subject to the laws of the several States which relate to the regulation or taxation of such business.

"2(b) No Act of Congress shall be construed to invalidate, impair, or su-

I

Petitioners are the New York State Chiropractic Association (NYSCA), a professional association of chiropractors, and the Union Labor Life Insurance Company (ULL), a Maryland insurer doing business in New York. As required by New York law, ULL's health insurance policies cover certain policyholder claims for chiropractic treatments. But certain ULL policies limit the company's liability to "the *reasonable* charges" for "*necessary* medical care and services." App. 19a, 22a (emphasis added). Accordingly, when presented with a policyholder claim for reimbursement for chiropractic treatments, ULL must determine whether the treatments were necessary and whether the charges for them were reasonable. In making some of these determinations, ULL has arranged with NYSCA to use the advice of NYSCA's Peer Review Committee.

The Committee was established by NYSCA in 1971, primarily to aid insurers in evaluating claims for chiropractic treatments.[2] It is composed of ten practicing New York chiropractors, who serve on a voluntary basis. At the request of an insurer, the Committee will examine a chiropractor's treatments and charges in a particular case, and will render an opinion on the necessity for the treatments and the reasonableness of the charges made for them. The opinion will be based upon such considerations as the treating chiro-

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persede any law enacted by any State for the purpose of regulating the business of insurance, . . . unless such Act specifically relates to the business of insurance. . . .

. . . . .

"3(b) Nothing contained in this chapter shall render the . . . Sherman Act inapplicable to any agreement to boycott, coerce, or intimidate, or act of boycott, coercion, or intimidation." 15 U. S. C. §§ 1012(a)-(b), 1013(b).

[2] The Committee's advice is also available to patients, governmental agencies, and chiropractors themselves, but insurers are the principal users. *Pireno* v. *New York State Chiropractic Ass'n*, 650 F. 2d 387, 388 (CA2 1981).

practor's experience and specialty degrees; the location of his office; the number of visits and time spent with the patient; the patient's age, occupation, general physical condition, and history of previous treatment; and x-ray findings.

Respondent is a chiropractor licensed and practicing in the State of New York. On a number of occasions his treatments of ULL policyholders, and his charges for those treatments, have been referred by ULL to the Committee, which has sometimes concluded that his treatments were unnecessary or his charges unreasonable. Petitioners assert that respondent has treated his patients "in a manner calculated to maximize the number of treatments for a particular condition, and that his fees for these treatments are unusually high." *Pireno* v. *New York State Chiropractic Ass'n*, 650 F. 2d 387, 389 (CA2 1981). Respondent, for his part, contends that the members of the Committee "practice 'antiquated' techniques that they seek to impose on their more innovative competitors." *Ibid.*

This dispute resulted in the present suit, brought by respondent in the United States District Court for the Southern District of New York. Respondent alleged that the peer review practices of petitioners violated § 1 of the Sherman Act.[3] In particular, he claimed that petitioners and others had used the Committee as the vehicle for a conspiracy to fix the prices that chiropractors, including respondent, would be permitted to charge for their services. He concluded that he had been restrained from providing his chiropractic services to the public freely and fully, and that would-be recipients of chiropractic services had been deprived of the benefits of competition. Respondent requested, *inter alia*, declaratory and injunctive relief against ULL's continued use of

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[3] 15 U. S. C. § 1, which provides in pertinent part that "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. . . ."

NYSCA's Peer Review Committee in evaluating policyholders' claims.

After extensive discovery, the District Court granted petitioners' motion for summary judgment dismissing respondent's complaint, concluding that ULL's use of NYSCA's Peer Review Committee was exempted from antitrust scrutiny by the McCarran-Ferguson Act. App. to Pet. for Cert. 20a–37a. The court noted that three requirements must be met in order to obtain the McCarran-Ferguson exemption: The challenged practices (1) must constitute the "business of insurance," (2) must be regulated by state law, and (3) must not amount to a "boycott, coercion, or intimidation." *Id.*, at 27a–28a. In the court's view, all three of these requirements were satisfied in the present case. In particular, the court held that petitioners' peer review practices constituted the "business of insurance" because they served "to define the precise extent of ULL's contractual obligations . . . under [its] policies." *Id.*, at 29a–30a. Moreover, the court determined that the peer review practices "involve[d] the spreading of risk, an indispensable element of the 'business of insurance.'" *Id.*, at 30a.[4] Respondents' Sherman Act claim was accordingly dismissed with prejudice.

The Court of Appeals for the Second Circuit reversed. 650 F. 2d 387. Relying upon this Court's recent opinion in

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[4] The court then turned to the Act's second requirement, that the challenged practices be "regulated by state law." The court held that that requirement had been met, as well, observing that New York had "enacted a pervasive scheme of regulation and supervision of insurance," had prohibited "the unfair settlement of claims," and had proscribed "the conduct alleged in the complaint" in its state antitrust law, the Donnelly Act, which by its terms applied to insurers. App. to Pet. for Cert. 31a–32a. Finally, the court determined that respondent had neither alleged a "boycott" on petitioners' part, nor offered evidentiary support for such a claim. *Id.*, at 33a–35a. The court thus concluded that the Act's third requirement was satisfied in the present case, and that petitioners' actions were consequently "exempt from application of the antitrust laws." *Id.*, at 36a.

Group Life & Health Ins. Co. v. *Royal Drug Co.*, 440 U. S. 205 (1979), the Court of Appeals concluded that the District Court had erred in holding that ULL's use of NYSCA's Peer Review Committee constituted the "business of insurance."[5] Accordingly, the Court of Appeals remanded the action for further proceedings. We granted certiorari to resolve a conflict among the Courts of Appeals on the question presented.[6] —— U. S. —— (1981).

II

The only issue before us is whether petitioners' peer review practices are exempt from antitrust scrutiny as part of the "business of insurance." "It is axiomatic that conduct which is not exempt from the antitrust laws may nevertheless be perfectly legal." *Group Life & Health Ins. Co.* v. *Royal Drug Co., supra*, at 210, n. 5. Thus in deciding this case we have no occasion to address the merits of respondent's Sherman Act claims. However, the Sherman Act does express a "longstanding congressional commitment to the policy of free markets and open competition." *Community Communications Co.* v. *Boulder*, —— U. S. ——, —— (1982); see also *United States* v. *Topco Associates*, 405 U. S. 596, 610 (1972). Accordingly, our precedents consistently hold that exemptions from the antitrust laws must be construed narrowly. *FMC* v. *Seatrain Lines, Inc.*, 411 U. S. 726, 733 (1973). This principle applies not only to implicit exemptions, see *Group Life & Health Ins. Co.* v. *Royal Drug*

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[5] Since it reached this conclusion, the Court of Appeals did not definitively address the other holdings of the District Court. See n. 4, *supra*. The court did note, however, that petitioner NYSCA did not itself "appear to be regulated by state law in the manner § 2(b) requires." 650 F. 2d, at 390, n. 5.

[6] As noted by the Court of Appeals, 650 F. 2d, at 395, n. 13, the decision below is contrary to that of the Court of Appeals for the Fourth Circuit "in a factually identical case." See *Bartholomew* v. *Virginia Chiropractors Ass'n*, 612 F. 2d 812 (1979).

Co., *supra*, at 231, but also to express statutory exemptions, see *United States* v. *McKesson & Robbins*, 351 U. S. 305, 316 (1956). In *Royal Drug*, *supra*, this Court had occasion to reexamine the scope of the express antitrust exemption provided for the "business of insurance" by § 2(b) of the McCarran-Ferguson Act. We hold that decision of the question before us is controlled by *Royal Drug*.

The principal petitioner in *Royal Drug* was a Texas insurance company, Blue Shield, that offered policies entitling insured persons to purchase prescription drugs for $2 each from any pharmacy participating in a "Pharmacy Agreement" with Blue Shield; policyholders were also allowed to purchase prescription drugs from a nonparticipating pharmacy, but in that event they would have to pay full price for the drugs and would be reimbursed by Blue Shield for only a part of that price. Blue Shield offered Pharmacy Agreements to all licensed pharmacies in Texas, but participating pharmacies were required to sell prescription drugs to Blue Shield's policyholders for $2 each, and were reimbursed only for their cost in acquiring the drugs thus sold. "Thus, only pharmacies that [could] afford to distribute prescription drugs for less than this $2 markup [could] profitably participate in the plan." 440 U. S., at 209.

Respondents in *Royal Drug* were the owners of nonparticipating pharmacies. They sued Blue Shield and several participating pharmacies under § 1 of the Sherman Act, alleging that the Pharmacy Agreements were the instrument by which Blue Shield had conspired with participating pharmacies to fix the retail prices of prescription drugs. Respondents also alleged that the Agreements encouraged Blue Shield's policyholders to avoid nonparticipating pharmacies, thus constituting an unlawful group boycott. The District Court granted summary judgment to Blue Shield and the other petitioners, holding that the challenged Agreements were exempt under § 2(b) of the McCarran-Ferguson Act. But the Court of Appeals disagreed, holding that the Agreements were not the "business of insurance" within the meaning of that Act, and reversed. 440 U. S., at 210. This Court affirmed. Looking to "the structure of the Act and its legislative history," *id.*, at 211, the Court discussed three characteristics of the business of insurance that Congress had intended to exempt through § 2(b).

First, after noting that one "indispensable characteristic of insurance" is the "spreading and underwriting of a policyholder's risk," *id.*, at 211–212,[7] the Court observed that parts of the legislative history of the McCarran-Ferguson Act "strongly suggest that Congress understood the business of insurance to be the underwriting and spreading of risk," *id.*, at 220–221. The Court then dismissed Blue Shield's contention that its Pharmacy Agreements involved such activities.

> "The Pharmacy Agreements . . . are merely arrangements for the purchase of goods and services by Blue Shield. By agreeing with pharmacies on the maximum prices it will pay for drugs, Blue Shield effectively reduces the total amount it must pay to its policyholders. The Agreements thus enable Blue Shield to minimize costs and maximize profits. Such cost-savings arrangements may well be sound business practice, and may well inure ultimately to the benefit of policyholders in the form of lower premiums, but they are not the 'business of insurance.'" *Id.*, at 214 (footnote omitted).

Second, the Court identified "the contract between the insurer and the insured" as "[a]nother commonly understood aspect of the business of insurance." *Id.*, at 215. The Court noted that, in enacting the McCarran-Ferguson Act, Congress had been concerned with the "relationship between insurer and insured, the type of policy which could be issued, its reliability, interpretation, and enforcement—these were the core of the 'business of insurance.'" *Id.*, at 215–216, quoting *SEC* v. *National Securities, Inc.*, 393 U. S. 453, 460 (1969). The Court then rejected Blue Shield's argument that its Pharmacy Agreements were so closely related to the "reliability, interpretation, and enforcement" of its policies as to fall within the intended scope of § 2(b): "This argument . . . proves too much." 440 U. S., at 216.

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[7] As the Court explained:

"'It is characteristic of insurance that a number of risks are accepted, some of which involve losses, and that such losses are spread over all the risks so as to enable the insurer to accept each risk at a slight fraction of the possible liability upon it.' 1 G. Couch, Cyclopedia of Insurance Law § 1:3 (2d ed. 1959). See also R. Keeton, Insurance Law § 1.2(a) (1971) ('Insurance is an arrangement for transferring and distributing risk'); 1 G. Richards, The Law of Insurance § 2 (W. Freedman 5th ed. 1952)." *Id.*, at 211 (footnote omitted).

> "At the most, the petitioners have demonstrated that the Pharmacy Agreements result in cost savings to Blue Shield which may be reflected in lower premiums if the cost savings are passed on to policyholders. But, in that sense, every business decision made by an insurance company has some impact on its reliability, its ratemaking, and its status as a reliable insurer . . . [and thus] could be included in the 'business of insurance.' Such a result would be plainly contrary to the statutory language, which exempts the 'business of insurance' and not the 'business of insurance companies.'" *Id.*, at 216–217.

Finally, the Court noted that in enacting the McCarran-Ferguson Act, "the primary concern of both representatives of the insurance industry and the Congress was that cooperative ratemaking efforts be exempt from the antitrust laws." *Id.*, at 221. This was so because of "the widespread view that it [was] very difficult to underwrite risks in an informed and responsible way without intra-industry cooperation." *Ibid.* The Court was thus reluctant to extend the § 2(b) exemption to the case before it, "because the Pharmacy Agreements involve parties wholly outside the insurance industry."

Id., at 231.

> "There is not the slightest suggestion in the legislative history that Congress in any way contemplated that arrangements such as the Pharmacy Agreements in this case, which involve the mass purchase of goods and services from entities outside the insurance industry, are the 'business of insurance.'" *Id.*, at 224 (footnote omitted).

In sum, *Royal Drug* identified three criteria relevant in determining whether a particular practice is part of the "business of insurance" exempted from the antitrust laws by § 2(b): *first*, whether the practice has the effect of transferring or spreading a policyholder's risk; *second*, whether the practice is an integral part of the policy relationship between the insurer and the insured; and *third*, whether the practice is limited to entities within the insurance industry. None of these criteria is necessarily determinative in itself, but examining the arrangement between petitioners NYSCA and ULL with respect to all three criteria, we do not hesitate to conclude that it is not a part of the "business of insurance."

Plainly, ULL's use of NYSCA's Peer Review Committee plays no part in the "spreading and underwriting of a policyholder's risk." *Group Life & Health Ins. Co.* v. *Royal Drug Co.*, 440 U. S., at 211. Both the "spreading" and the "underwriting" of risk refer in this context to the transfer of risk characteristic of insurance. See n. 7, *supra*. And as the Court of Appeals below observed,

> "The risk that an insured will require chiropractic treatment has been transferred from the insured to [ULL] by the very purchase of insurance. Peer review takes place only after the risk has been transferred by means of the policy, and then it functions only to determine whether the risk of the entire loss (the insured's cost of treatment) has been transferred to [ULL]—that is, whether the insured's loss falls within the policy limits." 650 F. 2d, at 393.

Petitioner ULL argues that the Court of Appeals' analysis is "semantic and unrealistic." Brief for Petitioner ULL 17. Petitioner reasons that "It is inconceivable that Congress would have included risk transfer within the 'business of insurance' but excluded a device that helps 'determine whether the risk . . . has been transferred' and acts as 'an aid in determining the scope of the transfer.'" *Ibid.* We find no merit in this argument, because the challenged peer review arrangement is logically and temporally unconnected to the transfer of risk accomplished by ULL's insurance policies. The transfer of risk from insured to insurer is effected by means of the contract between the parties —the insurance policy—and that transfer is complete at the time that the contract is entered. See 9 G. Couch, Cyclopedia of Insurance Law §§39:53, 39.63 (2d ed. 1962). If the policy limits coverage to "necessary" treatments and "reasonable" charges for them, then that limitation is the measure of the risk that has actually been transferred to the insurer: To the extent that the insured pays unreasonable charges for unnecessary treatments, he will not be reimbursed, because the risk of incurring such treatments and charges was never transferred to the insurer, but was instead always retained by the insured. Petitioner's argument contains the unspoken premise that the transfer of risk from an insured to his insurer actually takes place not when the contract between those parties is completed, but rather only when the insured's claim is settled. This premise is contrary to the fundamental principle of insurance that the insurance policy defines the scope of risk assumed by the insurer from the insured. See G. Couch, *supra*, at §39:3; R. Keeton, Insurance Law §5.1(a) (1971).

Turning to the second *Royal Drug* criterion, it is clear that ULL's use of NYSCA's Peer Review Committee is not an integral part of the policy relationship between insurer and insured. In the first place, the challenged arrangement between ULL and NYSCA is obviously distinct from ULL's contracts with its policyholders. In this sense the challenged arrangement resembles the Pharmacy Agreements in *Royal Drug*. There the Court rejected the proposition that the Agreements were "between insurer and insured." *Group Life & Health Ins. Co.* v. *Royal Drug Co., supra,* at 215, quoting *SEC* v. *National Securities, Inc., supra,* at 460. Rather, it recognized those Agreements as "separate contractual arrangements between Blue Shield and pharmacies engaged in the sale and distribution of goods and services other than insurance." 440 U. S., at 216. Similarly, ULL's use of NYSCA's Peer Review Committee is a separate arrangement between the insurer and third parties not engaged in the business of insurance.

Petitioner ULL argues that the challenged peer review practices satisfy this criterion because peer review "directly involves the 'interpretation' and 'enforcement' of the insurance contract." Brief for Petitioner ULL 16. But this argument is essentially identical to one made and rejected in *Royal Drug*. Blue Shield there contended that its Pharmacy Agreements "so closely affect[ed] the 'reliability, interpretation, and enforcement' of the insurance contract . . . as to fall within the exempted area." 440 U. S., at 216. This Court noted, however, that

> "The benefit promised to Blue Shield policyholders is that their premiums will cover the cost of prescription drugs except for a $2 charge for each prescription. So long as that promise is kept, policyholders are basically unconcerned with arrangements made between Blue Shield and participating pharmacies." *Id.*, at 213–214 (footnotes omitted).

Similarly, when presented with policyholder claims for reimbursement, ULL must decide whether the claims are covered by its policies. But these decisions are entirely ULL's, and its use of NYSCA's Peer Review Committee as an aid in its decisionmaking process is a matter of indifference to the policyholder, whose only concern is *whether* his claim is paid, not *why* it is paid. As in *Royal Drug*, petitioners have shown, at the most, that the challenged peer review practices result in "cost savings to [ULL] which may be reflected in lower premiums if the cost savings are passed on to policyholders." *Id.*, at 216. To grant the practices a § 2(b) exemption on such a showing "would be plainly contrary to the statutory language, which exempts the 'business of insurance' and not the 'business of insurance companies.'" *Id.*, at 217.

Finally, as respects the third *Royal Drug* criterion, it is plain that the challenged peer review practices are not limited to entities within the insurance industry. On the contrary, ULL's use of NYSCA's Peer Review Committee inevitably involves third parties wholly outside the insurance industry—namely, practicing chiropractors. Petitioners do not dispute this fact, but instead deprecate its importance. They argue that we should not conclude "that ULL's use of the peer review process is outside the scope of the 'business of insurance' simply because NYSCA is not an insurance company." Brief of Petititoner ULL 25. In petitioner's view,

> "There is nothing in the McCarran-Ferguson Act that limits the 'business of insurance' to the business of insurance companies. As this Court has stated, '[the Act's] language refers not to the persons or companies who are subject to state regulation, but to laws "regulating the *business* of insurance."' *National Securities*, 393 U. S. at 459." *Ibid.* (emphasis in original of quoted opinion).

Asserting that "the [New York] Superintendent of Insurance effectively can regulate the peer review process through his authority over the claims adjustment procedures of ULL," *id.*, at 26, petitioners conclude that the process is part of the "business of insurance" despite the necessary involvement of third parties outside the insurance industry.

We may assume that the challenged peer review practices need not be denied the § 2(b) exemption *solely* because they involve parties outside the insurance industry. But the involvement of such parties, even if not dispositive, constitutes part of the inquiry mandated by the *Royal Drug* analysis. As the Court noted there, § 2(b) was intended primarily to protect "*intra*-industry cooperation" in the underwriting of risks. 440 U. S., at 221 (emphasis added). Arrangements between insurance companies and parties outside the insurance industry can hardly be said to lie at the center of that legislative concern. More importantly, such arrangements may prove contrary to the spirit as well as the letter of § 2(b), because they have the potential to restrain competition in non-insurance markets. Indeed, the peer review practices challenged in the present case assertedly realize precisely this potential: Respondent's claim is that the practices restrain competition in a provider market—the market for chiropractic services—rather than in an insurance market. App. 8. Thus we cannot join petitioners in depreciating the fact that parties outside the insurance industry are intimately involved in the peer review practices at issue in this case.[8]

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[8] The premise of the dissent is that NYSCA's Peer Review Committee actually constitutes "the claims adjustor" in this case. See *post*, at 4. From this premise the dissent reasons that since "claims adjustment is part and parcel of the 'business of insurance' protected by the McCarran-Ferguson Act," *ibid.*, it necessarily follows that the peer review practices at issue in this case must enjoy the Act's exemption. The fatal flaw in this syllogism is that NYSCA's Peer Review Committee is *not* the claims adjustor. As the Court of Appeals noted, "Opinions of the committee are not binding unless the parties agree beforehand that they will be." 650 F. 2d, at 388. Thus in a case such as the present one, ULL is perfectly free to disregard the Committee's evaluation. Even if ULL were to act upon the Committee's opinion, the non-binding nature of the Committee's evaluation means that, at most, peer review is merely ancillary to the claims adjustment process. We see no reason that such ancillary activities must necessarily enjoy the McCarran-Ferguson exemption from the antitrust laws. Unlike activities that occur wholly within the insurance industry—such as the

III

In sum, we conclude that ULL's use of NYSCA's Peer Review Committee does not constitute the "business of insurance" within the meaning of § 2(b) of the McCarran-Ferguson Act.[9] The judgment of the Court of Appeals is accordingly

Affirmed.

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claims adjustment process itself—the ancillary peer review practices at issue in this case "involve parties wholly outside the insurance industry." See *Group Life & Health Ins. Co.* v. *Royal Drug Co.*, 440 U. S., at 231. Thus peer review falls afoul of the third *Royal Drug* criterion in a way in which pure claims adjustment activities cannot.

[9] This conclusion renders it unnecessary for us to address the questions whether the conduct challenged in respondent's complaint was "regulated by state law" or constituted a "boycott, coercion, or intimidation." See n. 5, *supra*.

SUPREME COURT OF THE UNITED STATES

Nos. 81–389 and 81–390

UNION LABOR LIFE INSURANCE COMPANY,
PETITIONER,
81–389 *v.*
A. ALEXANDER PIRENO

NEW YORK STATE CHIROPRACTIC ASSOCIATION,
PETITIONER,
81–390 *v.*
A. ALEXANDER PIRENO

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

[June 28, 1982]

JUSTICE REHNQUIST, with whom THE CHIEF JUSTICE and JUSTICE O'CONNOR join, dissenting.

Purporting to rely upon our recent decision in *Group Life & Health Ins. Co.* v. *Royal Drug Co.*, 440 U. S. 205 (1979), the Court today exposes to antitrust liability an aspect of the business of insurance designed to promote fair and efficient claims settlement. The Court reaches this conclusion by determining that the peer review process does not spread risk, is not an integral part of the insurance relationship, and is not limited to entities within the insurance industry. Because I find the claims adjustment function of the peer review committee to be at the heart of the relationship between insurance companies and their policyholders, I conclude that such committees are clearly within the sphere of insurance activity which the McCarran-Ferguson Act intended to protect from the effect of the antitrust laws.[1] This conclusion finds support in the legislative history of the Act and in *Royal Drug* and its predecessors.

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[1] Since the Court declines to reach the question of whether petitioners'

For many years statutes such as the Sherman Act were thought not applicable to the business of insurance, this Court having held in *Paul* v. *Virginia*, 8 Wall. 168, 183 (1868), that "[i]ssuing a policy of insurance is not a transaction of commerce." When this Court held in *United States* v. *South-Eastern Underwriters Assn.*, 322 U. S. 533 (1944), that the business of insurance was a part of interstate commerce subject to the Sherman Act, Congress responded quickly to reestablish the preeminence of States in regulating such business. Congress' response—the McCarran-Ferguson Act—sought primarily to protect the contractual relationship between the insurer and the insured:

> "Under the regime of *Paul* v. *Virginia*, *supra*, States had a free hand in regulating the dealings between insurers and their policyholders. Their negotiations, and the contract which resulted, were not considered commerce and were, therefore, left to state regulation. The *South-Eastern Underwriters* decision threatened the continued supremecy of the States in this area. The McCarran-Ferguson Act was an attempt to turn back the clock, to assure that the activities of insurance companies in dealing with their policyholders would remain subject to state regulation." *SEC* v. *National Securities, Inc.*, 393 U. S. 453, 459 (1969).

We recognized this congressional purpose in *Royal Drug*:

> "'The relationship between insurer and insured, the type of policy which could be issued, its reliability, interpretation, and enforcement—these were the core of the "busi-

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committee is regulated by state law as required by the McCarran-Ferguson Act, I likewise do not discuss it. I note, however, that the District Court found petitioners' committee to be so regulated. App. to Pet. for Cert. 31a–32a.

> ness of insurance." Undoubtedly, other activities of insurance companies relate so closely to their status as reliable insurers that they too must be placed in the same class. But whatever the exact scope of the statutory term, it is clear where the focus was—it was on the relationship between the insurance company and the policyholder.'" *Group Life & Health Ins. Co.* v. *Royal Drug Co.*, 440 U. S., at 215–216 (quoting *SEC* v. *National Securities, Inc.*, 393 U. S., at 460.)

Thus, whatever else was said in *Royal Drug* about the indispensable characteristic of risk-spreading, the Court found the contractual relationship between the insurer and the insured to be the essence of the "business of insurance."

Central to this contractual relationship is the process of claims adjustment—the determination of the actual payments to be made to the insured for losses covered by the insurance contract. The key representation of the insurance company and the principal expectation of the policyholder is that prompt payment will be made when the event insured against actually occurs. As one commentator has stated:

> "Up until the time there is a claim and a payment is made, the only tangible evidence of insurance is a piece of paper. In other words, the real product of insurance is the claims proceeds. Selection of the prospect, qualifying him for coverage that suits his needs, delivery of a policy, coverage to meet changing situations, all of these are but preambles to the one purpose for which the insurance was secured, namely to collect dollars if and when the unforeseen event takes place." J. Wickman, Evaluating the Health Insurance Risk 57 (1965).[2]

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[2] Other commentators agree with this assessment of the importance of claims settlement:

"The adjustment (including payment) of claims represents the final act in the insurance process. The payment of a claim by an insurance company

It is the claims adjustor—in this case petitioners' peer review committee—which determines whether and to what extent an insured's losses will be covered. The Court thus plainly errs when it concludes that the role of petitioners' peer review committee "is not an integral part of the policy relationship between insurer and insured," *ante*, at 10, and "is a matter of indifference to the policyholder." *Id.*, at 11. Few insurance matters could be of greater importance to policyholders than whether their claims will be paid, and it is the peer review committee which in effect makes that determination. Being a critical component of the relationship between an insurer and an insured, claims adjustment is part and parcel of the "business of insurance" protected by the McCarran-Ferguson Act.[2]

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brings the insurance contract 'to life' in a fashion far more vivid than does any other single act in connection with the purchase, issuance, and maintenance of the contract." Butler, Loss Adjustment in Fire Insurance, Property and Liability Insurance Handbook 219.

"Claim administration is the last link in the process of insurance—a process that begins with actuarial analysis and continues through sales, underwriting, investment, and policy service. . . . [T]he expectation of the policyowner that an insurer is willing to meet its obligations, through claims administration, is an important part in the decision to purchase insurance. Indeed, it is the claim administration function that delivers on the product sold to the policyowner." C. Cissley, Claim Administration: Principles and Practices iii (1980).

[2] Apparently unable to discern the difference between a mere method of paying a claim and the more fundamental process of determining whether a claim is covered by the insurance agreement, the Court finds that petitioners' peer review procedure "resembles the Pharmacy Agreements in *Royal Drug*." *Ante*, at 10–11. But the Pharmacy Agreement at issue in *Royal Drug* was simply a *method* of reimbursing policyowners for medication expenses. The policyowners could obtain medication from participating pharmacies simply by paying the amount that otherwise would not be covered by the insurance plan. The pharmacies thus constituted nothing more than in-kind dispensers of insurance payments; they played no role

This conclusion finds support in a source of guidance completely disregarded by the Court—the legislative history of McCarran-Ferguson. The passage of the Act was preceded by the introduction in the Senate Committee of a report and a bill prepared by the National Association of Insurance Commissioners. "The views of the NAIC are particularly significant, because the Act ultimately passed was based in large part on the NAIC bill." *Group Life & Health Ins. Co.* v. *Royal Drug Co.*, 440 U. S., at 221. Included in that bill were seven specific insurance practices to which the Sherman Act was not to apply, and to which the Court in *Royal Drug* looked for guidance as to the meaning of the phrase "business of insurance." See 440 U. S., at 222. Among those seven protected practices was the process of claims adjustment: "the said Sherman Act shall not apply . . . to any cooperative or joint service, *adjustment, investigation, or inspection agreement* relating to insurance." 90 Cong. Rec. A4406 (1944) (emphasis added). Other statements in the legislative history support the conclusion that claims adjustment was to be protected:

> "[W]e come squarely to the question of whether State regulation is adequate to handle insurance, or whether that business should be subject to the provisions of the antitrust laws. . . . A great number of fire-insurance companies have cooperated in mutual agreement—through the Southeastern Underwriters Association and rating bureaus, adjusting policy rates to risks, classifying insurable property either in co-insurance or re-insurance, *making appraisals of losses*, and working out systems of inspection to improve protection against fires. All of this has been done with splendid success.

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whatsoever in the more fundamental process of assessing the validity of a claim and determining the amount to be paid. Peer review committees, which fulfill such a fundamental role, are thus quite unlike the arrangements considered by the Court in *Royal Drug*.

> It would be a pity indeed, after all these years, to have the government intervene. The business of insurance involves long contracts. The fidelity of performance of those contracts will not brook intervention." 90 Cong. Rec. 6530 (1944) (remarks of Rep. Satterfield) (emphasis added). See also *id.*, at 6543 (remarks of Rep. Jennings); *id.*, at 6550–6551 (remarks of Rep. Ploeser).

The role of claims adjustment in the insurance relationship and the legislative history of the Act thus unmistakably demonstrate that claims settlement procedures such as petitioners' peer review committee were to be accorded protection from the antitrust laws as the "business of insurance." Few practices followed by insurance companies today present a fairer or more efficient means of claims resolution than professional peer review committees. Insurance claimants seek reimbursement for virtually every form of medical treatment and care, and determining the reasonableness and necessity of such expenses requires the expertise of a practicing physician. Because the entire spectrum of human ailments are involved, the views of one physician are seldom sufficient; specialists from many fields of medicine must be consulted. Few if any insurance companies can afford to staff their claims settlement departments with such a broad range of physicians. The companies thus must either make less than satisfactory claims determinations, or must turn to an outside group of experts such as petitioners' committee.

Although the Court protests that its decision says nothing about petitioners' antitrust liability, there can be little doubt that today's decision will vastly curtail the peer review process. Few professionals or companies will be willing to expose themselves to possible antitrust liability through such activity. The Court thus not only misreads the McCarran-Ferguson Act and our prior precedents, but also eliminates an aspect of the American insurance industry which has long redounded to the benefit of insurance companies and policyholders alike.

All issues available have been filmed. Unfortunately, any scattered missing issues are no longer available.

READEX FICHE

981/ 81- 395

(Slip Opinion)

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SUPREME COURT OF THE UNITED STATES

Syllabus

UNITED STEELWORKERS OF AMERICA, AFL-CIO-CLC *v.* SADLOWSKI ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 81-395. Argued March 31, 1982—Decided June 14, 1982

Petitioner union amended its constitution to include an "outsider rule" which prohibits candidates for union office from accepting campaign contributions from nonmembers and creates a committee to enforce the rule, the committee's decisions being final and binding. Respondents, including a union member who had been an unsuccessful candidate for union office before adoption of the outsider rule and had received much of the financial support for his campaign from sources outside the union, filed suit against petitioner in Federal District Court, claiming that the rule prohibited nonmember contributions to finance campaign-related litigation and thus violated § 101(a)(4) of the Labor-Management Reporting and Disclosure Act of 1959 (LMRDA), which provides that a union may not limit the rights of its members to institute an action in any court or administrative agency. The District Court found for respondents. The Court of Appeals affirmed, agreeing that the outsider rule violated § 101(a)(4). It also accepted respondents' argument, first raised on appeal, that the rule violated the "freedom of speech and assembly" provision of § 101(a)(2) of the LMRDA giving every union member the right to assemble freely with other members and to express at union meetings his views about candidates in union elections or any business properly before the meeting. The Court of Appeals rejected petitioner's argument that the outsider rule was protected by § 101(a)(2)'s proviso, which gives a union authority to adopt "reasonable" rules regarding its members' responsibilities.

Held:

1. Petitioner's outsider rule does not violate § 101(a)(2). Although it may interfere with rights Congress intended to protect, it is rationally related to a legitimate and protected purpose, and thus is sheltered by § 101(a)(2)'s proviso. Pp. 5-16.

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(a) In light of the legislative history, § 101(a)(2) cannot be read as incorporating the entire body of First Amendment law so as to require that the scope of protections afforded union members by the statute coincide with the protections afforded by the Constitution as to a political election candidate's freedom to receive campaign contributions. Union rules are valid under the statute so long as they are reasonable; they need not pass the stringent tests applied in the First Amendment context. Pp. 5–8.

(b) Congress adopted the freedom of speech and assembly provision of § 101(a)(2) in order to promote union democracy, particularly through fostering vigorous debate during election campaigns. Although petitioner's outsider rule does affect rights protected by the statute and may limit somewhat the ability of insurgent union members to wage an effective campaign against incumbent officers, as a practical matter the impact may not be substantial. The record shows that challengers have been able to defeat incumbents or administration-backed candidates, despite the absence of financial support from nonmembers. Pp. 8–12.

(c) Petitioner's purpose in adopting the outsider rule was to ensure that nonmembers would not unduly influence union affairs and that the union leadership would remain responsive to the membership. The policies underlying the LMRDA show that this is a legitimate purpose that Congress meant to protect. Nor is the rule invalid on the asserted ground that it is not rationally related to that purpose because the union could have simply established contribution ceilings, or need not have limited contributions by relatives and friends, or could have simply required that candidates reveal the sources of their funds. Petitioner had a reasonable basis for its decision to impose a broad ban seeking to eradicate the threat of outside influence. Pp. 12–16.

2. Petitioner's outsider rule does not violate § 101(a)(4)'s right-to-sue provision. The rule simply does not apply where a member uses funds from outsiders to finance litigation. Neither the rule's language nor the debates leading up to its passage indicate that petitioner intended the rule to apply in such context. Moreover, petitioner's rule-enforcement committee issued an opinion stating that the rule's limitations "do not apply to the financing of lawsuits by non-members for the purpose of asserting the legal rights of candidates or other union members in connection with elections." Pp. 16–17.

207 U. S. App. D. C. 189, 645 F. 2d 1114, reversed and remanded.

MARSHALL, J., delivered the opinion of the Court, in which POWELL, REHNQUIST, STEVENS, and O'CONNOR, JJ., joined. WHITE, J., filed a dissenting opinion, in which BURGER, C. J., and BRENNAN and BLACKMUN, JJ., joined.

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SUPREME COURT OF THE UNITED STATES

No. 81-395

UNITED STEELWORKERS OF AMERICA, AFL-CIO-CLC, PETITIONER *v.* EDWARD SADLOWSKI, JR., ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

[June 14, 1982]

JUSTICE MARSHALL delivered the opinion of the Court.

In this case, we confront the question whether § 101(a)(2) of the Labor-Management Reporting and Disclosure Act of 1959 (LMRDA), 29 U. S. C. § 411(a)(2), precludes the membership of a union from adopting a rule that prohibits candidates for union office from accepting campaign contributions from nonmembers. The United States Court of Appeals for the District of Columbia held that such a rule violated § 101(a)(2). *Sadlowski* v. *United Steelworkers of America*, 645 F. 2d 1114 (1981). We granted certiorari, —— U. S. —— (1981), and now reverse.

I

A

Petitioner United Steelworkers of America (USWA), a labor organization with 1,300,000 members, conducts elections for union president and other top union officers every four years. The elections for these officers are decided by referendum vote of the membership. In the 1977 election, which was hotly contested, two candidates ran for president: respondent Edward Sadlowski, Jr., the Director of USWA's largest District, and Lloyd McBride, another District Director.[1] Both Sadlowski and McBride headed a slate of candidates for the other top union positions.

McBride was endorsed by the incumbent union leadership, and received substantial financial support from union officers and staff. Sadlowski, on the other hand, received much of his financial support from sources outside the union. During the campaign, the question whether candidates should accept contributions from persons who were not members of the union was vigorously debated. The McBride slate contended that outsider participation in USWA elections was dangerous for the union. App. 27 n. 2, 298. See also App. 129, 398; see generally App. 40–48. McBride ultimately defeated Sadlowski by a fairly wide margin—57% to 43%. The other candidates on the McBride slate won by similar margins.

After the elections, union members continued to debate the question whether outsider participation in union campaigns was desirable. This debate was finally resolved in 1978, when USWA held its biennial Convention. The Convention, which consists of approximately 5,000 delegates elected by members of USWA's local unions, is USWA's highest governing body. At the 1978 Convention, several local unions submitted resolutions recommending amendment of the USWA Constitution to include an "outsider rule" prohibiting campaign contributions by nonmembers. The union's International Executive Board also recommended a ban on nonmember contributions. Acting on the basis of these recommendations, the Convention's Constitution Committee proposed to the Convention that it adopt an outsider rule. After a debate on the floor of the Convention, the delegates, by a margin of roughly 10 to 1, voted to include such a rule in the Constitution. App. 35–36, 81–105.

The outsider rule, Article V, § 27 of the USWA Constitution, provides in pertinent part:

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[1] The USWA is divided into 25 districts, which are headed by District Directors. District Directors are elected every four years by referendum vote of the members within each district. App. 7

> "Sec. 27. No candidate (including a prospective candidate) for any position set forth in Article IV, Section 1, and supporter of a candidate may solicit or accept financial support, or any other direct or indirect support of any kind (except an individual's own volunteered personal time) from any non-member." USWA Const. Art. V, § 27.[2]

Section 27 confers authority upon the International Executive Board to adopt regulations necessary to implement the provision. It also creates a Campaign Contribution Administative Committee, consisting of three "distinguished, impartial" nonmembers to administer and enforce the provision. *Id.* The Committee may order a candidate to cease and desist from conduct that breaches § 27, and may declare a candidate disqualified. Its decisions are final and binding.

B

In October 1979, Sadlowski and several other individuals[3] filed suit against USWA in the United States District Court for the District of Columbia. They claimed, *inter alia*, that the outsider rule violated the "right to sue" provision of Title I of the LMRDA, § 101(a)(4), 29 U. S. C. § 411(a)(4), because it would prohibit a candidate from accepting nonmember contributions to finance campaign-related litigation. Both sides moved for summary judgment. The District Court found that the rule violated § 101(a)(4). *Sadlowski* v. *USWA*, 507 F. Supp. 623, 625 (D D.C. 1981). The District Court further decided to invalidate the rule *en toto*, because the portion of the rule that "limits meaningful access to the courts . . . cannot be separated or isolated from the rule in its entirety." *Id.*

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[2] The offices set forth in Article IV, Section 1 of the USWA Constitution are International President, International Secretary, International Treasurer, International Vice President (Administration), International Vice President (Human Affairs), District Director for the 25 Districts, and a National Director for Canada. USWA Const. Art. IV, § 1.

[3] Other plaintiffs included Joseph Samargia, a USWA member and potential candidate for union office; Edward Sadlowski, Sr., a retired union member who campaigned for his son in 1977; Leonard S. Rubenstein, a nonmember who made contributions to Sadlowski, Jr. during the 1977 campaign; and James Miller, a nonmember who donated legal services during the 1977 campaign. Samargia alleged that he might run for union office in the 1981 elections. Sadlowski, Sr., Rubenstein, and Miller alleged that they might wish to contribute services or funds in future USWA elections. App. 5-6, 16. Each of these individuals is also a respondent here.

The United States Court of Appeals for the District of Columbia Circuit affirmed. *Sadlowski* v. *USWA*, 645 F. 2d 1114 (CADC 1981). The Court agreed that Article V, § 27 violated the right to sue provision. However, it chose not to decide whether this violation alone justified an injunction restraining enforcement of the entire rule. It accepted respondents' argument, first raised on appeal, that the outsider rule also violated the § 101(a)(2) "freedom of speech and assembly" provision, and that this violation justified the injunction. The Court of Appeals reasoned that the statutory goal of union democracy could be achieved only if "effective challenges can be made to the often-entrenched union leadership." 645 F. 2d, at 1122. But effective challenges are possible only if insurgent candidates can solicit contributions from outsiders. "Even without contribution limitations, challengers to the union leadership face substantial barriers, especially the electoral power of the union staff." *Id.*, at 1121. The Court rejected the union's argument that even if the rule interfered with rights protected by the statute, it was protected by the proviso to § 101(a)(2), which gives a union authority to adopt "reasonable" rules regarding the responsibilities of its members. *Id.*, at 1123.

To buttress its analysis, the Court of Appeals relied heavily on its understanding of First Amendment jurisprudence. It stated that § 101(a)(2) places "essentially the same limits on labor unions with respect to outside campaign contributions that the First Amendment would if it applied to labor unions." *Id.*, at 1120. Citing *Buckley* v. *Valeo*, 424

U. S. 1, 19 (1976) (per curiam), the Court of Appeals suggested that contribution rules that prevent candidates for political office from amassing the resources necessary for effective advocacy are unconstitutional. By analogy, since the outsider rule would interfere with effective advocacy in union campaigns, it must violate § 101(a)(2). *Id.*, at 1122.

II

Section 101(a)(2) is contained in Title I of the LMRDA, the "Bill of Rights of Members of Labor Organizations." See 29 U. S. C. §§ 411–415. It provides:

> "*Freedom of speech and assembly.*—Every member of any labor organization shall have the right to meet and assemble freely with other members; and to express any views, arguments, or opinions; and to express at meetings of the labor organization his views, upon candidates in an election of the labor organization or upon any business properly before the meeting, subject to the organization's established and reasonable rules pertaining to the conduct of meetings: *Provided*, That nothing herein shall be construed to impair the right of a labor organization to adopt and enforce reasonable rules as to the responsibility of every member toward the organization as an institution and to his refraining from conduct that would interfere with its performance of its legal or contractual obligations.

We must decide whether this statute is violated by a union rule that prohibits candidates for union office from accepting campaign contributions from individuals who are not members of the union.

A

At the outset, we address respondents' contention that this case can be resolved simply by reference to First Amendment law. Respondents claim that § 101(a)(2) confers upon union members rights equivalent to the rights established by the First Amendment. They further argue that in the context of a political election, a rule that placed substantial restrictions on a candidate's freedom to receive campaign contributions would violate the First Amendment. Thus, a rule that substantially restricts contributions in union campaigns must violate § 101(a)(2). We are not persuaded by this argument. In light of the legislative history, we do not believe that § 101(a)(2) should be read as incorporating the entire body of First Amendment law, so that the scope of protections afforded by the statute coincides with the protections afforded by the Constitution.

The legislation that ultimately evolved into Title I of the LMRDA was introduced on the floor of the Senate by Senator McClellan. The Senate Committee on Labor and Public Welfare had reported out a bill containing provisions that were the forerunners of Titles II through VI of the LMRDA. These provisions focused on specific aspects of union affairs: they established disclosure requirements and rules governing union trusteeships and elections. See S. 1555, 86th Cong., 1st Sess. (1959), 1 NLRB, Legislative History of the Labor-Management Reporting and Disclosure Act of 1959 (Leg. Hist.) 338–396; see also *Finnegan* v. *Leu*, —— U. S. ——, —— (1982). Senator McClellan and other legislators feared that the bill did not go far enough because it did not provide general protection to union members who spoke out against the union leadership. Senator McClellan therefore proposed an amendment that he described as a "Bill of Rights" for union members. This amendment, which contained the forerunner of § 101(a)(2), as well as the forerunners of other Title I provisions, was designed to guarantee every union member equal voting rights, rights of free speech and assembly, and a right to sue. 105 Cong. Rec. 6469–6493 (1959), 2 Leg. Hist. 1096–1119.

Senator McClellan hoped that the amendment would "bring to the conduct of union affairs and to union members the reality of some of the freedoms from oppression that we enjoy as citizens by virtue of the Constitution of the United States." 105 Cong. Rec. 6472 (1959), 2 Leg. Hist. 1098. He further stated that "the rights which I desire to have spelled out in the bill are not now defined in the bill. Such rights are basic. They ought to be basic to every person, and they are, under the Constitution of the United States." 105 Cong. Rec. 6478 (1959), 2 Leg. Hist. 1104–1105. Senator McClellan explained the freedom of assembly provision, in particular, as follows:

> "That [provision] gives union members the right to assemble in groups, if they like, and to visit their neighbors and to discuss union affairs, and to say what they think, or perhaps discuss what should be done to straighten out union affairs, or perhaps discuss the promotion of a union movement, or perhaps a policy in which they believe. They would be able to do all of that without being punished for doing it, as is actually happening today." 105 Cong. Rec. 6478 (1959), 2 Leg. Hist. 1104.

Other Senators made similar statements. See 105 Cong. Rec. 6483 (1959) (Sen. Curtis); *id.*, at 6488 (Sen. Goldwater); *id.*, at 6489 (Sen. Mundt); *id.*, at 6490 (Sen. Dirksen); *id.*, at 6726 (Sen. Javits); 2 Leg. Hist. 1109, 1115, 1116, 1238.

The McClellan amendment was adopted by a vote of 47–46. 105 Cong. Rec. 6492 (1959), 2 Leg. Hist. 1119. Shortly thereafter, Senator Kuchel offered a substitute for the McClellan amendment. This substitute added the proviso that now appears in § 101(a)(2), which preserves the union's right to adopt reasonable rules governing the responsibilities of its members. It was designed to remove "the extremes raised by the [McClellan] amendment, 105 Cong. Rec. 6721 (1959), 2 Leg. Hist. 1234 (Sen. Cooper), and to assure that the amendment would not "unduly harass and obstruct legitimate unionism." 105 Cong. Rec. 6722 (1959), 2 Leg. Hist. 1233

(Sen. Church). The Kuchel amendment was approved by a vote of 77–14. See 105 Cong. Rec. 6020–6030 (1959), 2 Leg. Hist. 1229–1239. The legislation was then taken up in the House of Representatives. The House bill, which contained a "Bill of Rights" identical to that adopted by the Senate, was quickly approved. H.R. 8400, 86th Cong., 1st Sess. (1959), 1 Leg. Hist. 628–633.

This history reveals that Congress modelled Title I after the Bill of Rights, and that the legislators intended § 101(a)(2) to restate a principal First Amendment value—the right to speak one's mind without fear of reprisal. However, there is absolutely no indication that Congress intended the scope of § 101(a)(2) to be identical to the scope of the First Amendment. Rather, Congress' decision to include a proviso covering "reasonable" rules refutes that proposition. First Amendment freedoms may not be infringed absent a compelling governmental interest. Even then, any government regulation must be carefully tailored, so that rights are not needlessly impaired. *Brown* v. *Hartlage*, —— U. S. ——, —— (1982). Union rules, by contrast, are valid under § 101(a)(2) so long as they are reasonable; they need not pass the stringent tests applied in the First Amendment context.

B

To determine whether a union rule is valid under the statute, we first consider whether the rule interferes with an interest protected by the first section of § 101(a)(2). If it does, we then determine whether the rule is "reasonable" and thus sheltered by the proviso to § 101(a)2). In conducting these inquiries, we find guidance in the policies that underly the LMRDA in general and Title I in particular. First Amendment principles may be helpful, although they are not controlling. We must look to the objectives Congress sought to achieve, and avoid "placing great emphasis upon close construction of the words." *Wirtz* v. *Local 153, Glass Bottle*

Blowers Ass'n, 389 U. S. 463, 468 & n. 6 (1968) (quoting Cox, Internal Affairs of Labor Unions Under the Labor Reform Act of 1959, 58 Mich. L. Rev. 819, 852 (1960)); *Hall* v. *Cole*, 412 U. S. 1, 11 & n. 17 (1973).[4] The critical question is whether a rule that partially interferes with a protected interest is nevertheless reasonably related to the protection of the organization as an institution.

Appyling this form of analysis here, we conclude that the outsider rule is valid. Although it may limit somewhat the ability of insurgent union members to wage an effective campaign, an interest deserving some protection under the statute, it is rationally related to the union's legitimate interest in reducing outsider interference with union affairs.

(1)

An examination of the policies underlying the LMRDA indicates that the outsider rule may have some impact on interests that Congress intended to protect under § 101(a)(2). Congress adopted the freedom of speech and assembly provision in order to promote union democracy. See *supra*, at 6–8; see also S. Rep. No. 187, 86th Cong., 1st Sess. 2 (1959), 1 Leg. Hist. 398; H.R. Rep. No. 741, 86th Cong., 1st Sess. 2 (1959), 1 Leg. Hist. 760. It recognized that democracy would be assured only if union members are free to discuss union policies and criticize the leadership without fear of reprisal. Congress also recognized that this freedom is particularly critical, and deserves vigorous protection, in the context of election campaigns. For it is in elections that members can wield their power, and directly express their approval or disapproval of the union leadership. See S. Rep. No. 187, *supra*, at 2–5, 7, 2 Leg. Hist. 398–401, 416; H.R. Rep. No. 741, *supra*, at 1–7, 15–16, 1 Leg. Hist. 759–765, 773–774.[5]

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[4] Neither the language contained in the first part of § 101(a)(2), which describes the "right to meet and assemble freely," nor the language contained in the proviso, which states that unions may adopt "reasonable rules as to the responsibility of every member toward the organization as an institution," should be read narrowly. As we have already indicated, it seems clear that Congress intended the first part of § 101(a)(2) to be given a flexible interpretation. See *supra*, at 6–8; see also *infra*, at 9–10. And Congress adopted the proviso in order to ensure that the scope of the statute was limited by a general rule of reason. It indicated that the courts are to play a role in the determination of reasonableness. See 105 Cong. Rec. 6719 (1959) (Sen. Kuchel), 2 Leg. Hist. 1231; 105 Cong. Rec. 6726 (1959) (Sen. Javits), 2 Leg. Hist. 1238. See also *supra*, at 10. See generally 105 Cong. Rec. 6020–6030 (1959), 2 Leg. Hist. 1229–1239.

The interest in fostering vigorous debate during election campaigns may be affected by the outsider rule. If candidates are not permitted to accept contributions from persons outside the union, their ability to criticize union policies and to mount effective challenges to union leadership may be weakened. Restrictions that limit access to funds may reduce the number of issues discussed, the attention that is devoted to each issue, and the size of the audience reached. Cf. *Buckley* v. *Valeo*, 424 U. S. 1, 14 (1976) (per curiam) (First Amendment freedom of expression and association may be "diluted if it does not include the right to pool money through contributions, for funds are often essential if 'advocacy' is to be truly or optimally 'effective'").[6]

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[5] See also *Hall* v. *Cole*, 412 U. S. 1, 14 (1973) ("Title I of the LMRDA was specifically designed to protect the union member's right to seek higher office within the union"). Cf. *Wirtz* v. *Bottle Blowers Ass'n*, 389 U. S. 463, 470 (1968) (Title IV designed to ensure free and democratic elections).

[6] In several First Amendment cases, we have protected contribution and solicitation of the financial support necessary to further effective advocacy. See, *e. g.*, *Citizens Against Rent Control* v. *City of Berkeley*, —— U. S. —— (1981); *Village of Schaumberg* v. *Citizens for a Better Environment*, 444 U. S. 620 (1980); *First National Bank of Boston* v. *Bellotti*, 435 U. S. 765 (1978). These cases are not directly analogous, however. Contribution limitations potentially infringe the First Amendment rights of contributors as well as candidates. *Buckley* v. *Valeo*, 424 U. S. 1, 24–25 (1976) (per curiam). Here, the nonmember *contributors* have no right of

Although the outsider rule does affect rights protected by the statute, as a practical matter the impact may not be substantial. Respondents, as well as the Court of Appeals, suggest that incumbents have a large advantage because they can rely on their union staff during election campaigns. Challengers cannot counter this power simply by seeking funds from union members; the rank-and-file cannot provide sufficient support. Thus, they must be permitted to seek funds from outsiders. In fact, however, the rank-and-file probably can provide support. The USWA is a very large union whose members earn sufficient income to make campaign contributions. See App. 118–120. Requiring candidates to rely solely on contributions from members will not unduly limit their ability to raise campaign funds. Uncontradicted record evidence[7] discloses that challengers have been able to defeat incumbents or administration-backed candidates, despite the absence of financial support from nonmembers. See App. 25, 113–119.[8]

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expression protected by the statute.

[7] This case is here on cross-motions for summary judgment. We reach a conclusion oppposite to that reached by the Court of Appeals—that the outsider rule is valid. In making this decision, we have assumed that all of the evidence submitted by respondents is true. In addition, we have relied on evidence submitted by the union only when it is uncontradicted.

Here, to support their claim that incumbents have a large advantage in union elections, respondents have submitted numerous affidavits. We do not intend to deny the existence of this advantage. For the purposes of our decision in this case, we think it sufficient to observe that there is uncontradicted evidence demonstrating that effective campaigns have been mounted by nonincumbents—and that the interference with interests protected by § 101(a)(2) is only partial.

[8] USWA has submitted evidence suggesting that the adoption of the outsider rule did not have an adverse effect on the 1981 election campaigns. A nonincumbent candidate for district director in a relatively small district has testified that he had raised in excess of $30,000 from rank-and-file members as early as fifteen months before the election. App. 121–123, 217–218. Respondents have not submitted any opposing evidence.

In addition, although there are undoubtedly advantages to incumbency, see *Hall* v. *Cole*, 412 U. S., at 13, respondents and the Court of Appeals may overstate those advantages. Staff employees are forbidden by § 401(g) of the LMRDA, 29 U. S. C. § 481(*g*), and by internal USWA rules from campaigning on union time or from using union funds, facilities, or equipment for campaign purposes. App. 110–117; see 29 CFR § 452.76 (1981). Staff officers have a contractual right to choose whether or not to participate in any USWA campaign without being subjected to discipline or reprisal for their decision. See App. 107–110, 115–117, 228, 384–385. Indeed, USWA elections have frequently involved challenges to incumbents by members of the staff. Many of these challenges have been successful. App. 108, 201–216.

The impact of the outsider rule on rights protected under § 101(a)(2) is limited in another important respect. The union has stated that the rule would not prohibit union members who are not involved in a campaign from using outside funds to address particular issues. That is, members could solicit funds from outsiders in order to focus the attention of the rank-and-file on a specific problem. The fact that union members remain free to seek funds for this purpose will serve as a counter to the power of entrenched leadership, and ensures that debate on issues that are important to the membership will never be stifled.

(2)

Although the outsider rule may implicate rights protected by § 101(a)2), it serves a legitimate purpose that is clearly protected under the statute. The union adopted the rule because it wanted to ensure that nonmembers do not unduly influence union affairs. USWA feared that officers who received campaign contributions from nonmembers might be beholden to those individuals and might allow their decisions to be influenced by considerations other than the best interests of the union. The union wanted to ensure that the union leadership remained responsive to the membership. See App. 210; see also App. 61–62, 81–97, 275, 303, 304.[9] An examination of the policies underlying the LMRDA reveals that this is a legitimate purpose that Congress meant to protect.

Evidence that Congress regarded the desire to minimize outsider influence as a legitimate purpose is provided by the history to Title I. On the Senate floor, Senator McClellan argued that a bill of rights for union members was necessary because some unions had been "invaded" or "infiltrated" by outsiders who had no interest in the members but rather had seized control for their own purposes. 2 Leg. Hist. 1097–1100. He stated that the strongest support for the bill of rights provisions "should come from traditional union leaders. It will protect them from the assaults of those who would capture their unions." *Id.*, at 1097. And he stated:

> "[infiltration could be ended] by placing the ultimate power in the hands of the members, where it rightfully belongs, so that they may be ruled by their free consent, [and] may bring about a regeneration of union leadership. I believe the unions should be returned to those whom they were designed to serve; they should not be left to the hands of those who act as masters. The union must be returned to their members, to whom they rightfully belong." *Id.*, at 1099.

It is true that Senator McClellan was particularly concerned about infiltration of unions by racketeers: he described situations in which "thugs and hoodlums" had taken over unions so that they could exploit the members for pecuniary gain. *Id.*, at 1097. However, his statements also indicate a more general desire to ensure that union members, and not outsiders, control the affairs of their union.

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[9] Respondents allege that the rule was forced upon the union members by high union officers, who wanted to ensure that they were insulated from effective challenges in future elections. However, the record does not support respondents' claims. The outsider rule was adopted through democratic processes, and was favored by an overwhelming majority of the delegates to the 1978 Convention. See *supra* at 2. These delegates had been elected by the rank-and-file. See App. 301–302.

Additional evidence that Congress regarded the union's desire to maintain control over its own affairs as legitimate is provided by the history of other sections of the LMRDA. In drafting Titles II through VI, Congress was guided by the general principle that unions should be left free to "operate their own affairs, as far as possible." S. Rep. No. 1684, 85th Cong., 2d Sess. 4–5 (1958). It believed that only essential standards should be imposed by legislation, and that in establishing those standards, great care should be taken not to undermine union self-government. Given certain miminum standards, "individual members are fully competent to regulate union affairs." *Id.* Thus, for example, in Title IV, which regulates the conduct of union elections, Congress simply set forth certain minimum standards. So long as unions conform with these standards, they are free "to run their own elections." *Wirtz* v. *Bottle Blowers Assn.*, 389 U. S., at 471. Congress' desire to permit unions to regulate their own affairs and to minimize governmental intervention suggests that it would have endorsed union efforts to reduce outsider influence.

Indeed, specific provisions contained in Title IV provide support for our conclusion that the outsider rule serves a legitimate and protected purpose. Section 401(g), 29 U. S. C. § 481(g), prohibits the use of employer as well as union funds in election campaigns. This ban reflects a desire to minimize the danger that employers will influence the outcome of union elections. A union rule that seeks to reduce the influence of outsiders other than employers is clearly consistent with that goal. See also § 403 of Title IV of the LMRDA, 29 U. S. C. § 843 (authorizing unions to establish their own election rules).[10]

Respondents argue that even if the desire to reduce outside influence is a legitimate purpose, the rule is not rationally related to that purpose. They contend, first, that the union could simply have established contribution ceilings, rather than placing an absolute ban on nonmember contributions. However, USWA feared not only that a few individual nonmembers would make large contributions, but that outsiders would solicit many like-minded persons for small contributions which, when pooled, would have a substantial impact on the election. This fear appears to have been reasonable. In the 1977 election, Sadlowski received a significant percentage of his campaign funds from individuals who made contributions after receiving mail solicitations signed by prominent nonmembers. App. 128–129, 350–353.

Respondents also contend that even if the union was justified in limiting contributions by true outsiders, it need not have limited contributions by relatives and friends. Again, however, the USWA had a reasonable basis for its decision to impose a broad ban. An exception for family members and friends might have created a loophole that would have made the rule unenforceable: true outsiders could simply funnel their contributions through relatives and friends. See App. 32. Cf. *Buckley* v. *Valeo*, 424 U. S., at 53 n. 59 (Congress could constitutionally subject family members to the same limitations as nonfamily members).

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[10] Section 403 provides "No labor organization shall be required by law to conduct elections of officers with greater frequency or in a different form or manner than is required by its own constitution or bylaws, except as otherwise provided by [Title IV]." The union argues that the outsider rule can be justified solely on the basis of this provision, since the rule is otherwise consistent with Title IV. We are not persuaded by this argument. Section 403 must be interpreted in light of the provisions of Title I, which were adopted precisely because Congress feared that Titles II through VI did not provide sufficient protection to union members. Thus, even if the rule satisfies § 403, it must also satisfy Title I.

Finally, respondents contend that USWA could simply have required that candidates for union office reveal the sources of their funds. But a disclosure rule, by itself, would not have solved the problem. Candidates who received such funds might still be beholden to outsiders. A disclosure requirement ensures only that union members know about this possibility when they cast their votes. It does not eradicate the threat of outside influence.[11]

III

As an alternative basis for sustaining the result below, respondents ask this Court to hold that the outsider rule impermissibly encroaches upon its members' right, guaranteed by § 101(a)(4) of the LMRDA, to institute legal proceedings, and that the appropriate remedy for this violation is an injunction striking down the rule *en toto*. However, unlike the District Court and the Court of Appeals, we do not believe that the union's rule violates the right to sue provision.

Section 101(a)(4) provides that a union may not "limit the right of any member thereof to institute an action in any court, or in a proceeding before any administrative agency." 29 U. S. C. § 411(a)(4). The outsider rule would clearly violate this provision if it prohibited union members from accepting financial or other support from nonmembers for the purpose of conducting campaign-related litigation. In our view, however, the outsider rule simply does not apply where a member uses funds from outsiders to finance litigation.

The language of the rule contains no reference to litigation. In addition, the debates leading up to the passage of the rule do not contain any indication that the union intended the rule to apply in this context. But what is most persuasive, the Campaign Contribution Administration Committee (the Committee)[12]—which was given authority to make final and binding interpretations of the outsider rule—has issued an opinion concerning the impact of the outsider rule on the right to sue. In this opinion, it holds that "the limitations imposed by Section 27 do not apply to the financing of lawsuits by non-members for the purpose of asserting the legal rights of candidates or other union members in connection with elections."[13] App. 455; see also App. 456–458.[14]

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[11] Respondents also contend that the outsider rule is under-inclusive, because it does not apply to local union elections. As USWA explains in an unrebutted affidavit, however, an outsider rule for local union elections was considered and rejected because outsiders generally have little interest in influencing local campaigns, and enforcing an outsider rule in such elections would be an administrative burden. App. 30–32.

The Court of Appeals expressed concern about a regulation contained in the USWA's Election Manual which provides that although the outsider rule "does not prohibit the candidate's use of financial support or services from non-members to pay fees for legal or accounting services performed in . . . securing . . . legal rights of candidates," it does prohibit "[a]ctivities which are designed to extract political gain from legal proceedings." App. 495. According to the Court of Appeals, the reference to "activities" might include steps in the legal procedings themselves, and might prohibit outside assistance to finance a lawsuit even if it was brought in good faith, if it was designed to extract political gain. 645 F. 2d, at 1119. USWA has explained, however, that this language is intended to cover only nonlitigation activities that in some way refer to litigation, such as mailing a flyer announcing a legal victory, or some information learned during discovery.[15] See 645 F. 2d, at 1118–1119.[16]

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[12] The three Committee members included former Secretary of Labor W. Willard Wirtz; David Lewis, professor at Carleton University; and Eric Springer, former Director of Compliance of the United States Equal Employment Opportunity Commission and Chairman of the Commission on Human Relations in Pittsburgh, Pennsylvania. App. 37–38.

[13] The opinion further stated that it was

"confined to services which are in fact legal services customarily performed by lawyers. The Committee recognizes the possibility that any ruling which it makes in general terms and in response to a broad inquiry may be misconstrued or distorted in an attempt to rationalize political activities as 'legal services.' It will deal with those questions whenever they arise on a case-by-case basis." App. 458.

[14] The Committee left open the question whether the outsider rule would apply to a lawsuit that is not a *bona fide* attempt to secure an adjudication of legal rights, but, rather, is motivated solely by a desire to promote a candidate's political campaign. App. 458. The USWA has urged the Committee not to impose such a ban unless it is clear that the rule would not deter *bona fide* lawsuits. App. 245–246. It is arguable that such a rule might violate § 101(a)4) if it had the unmistakeable effect of deterring *bona fide* lawsuits by individuals who feared that the Committee might misjudge their motives and impose sanctions. However, the speculative possibility that the Committee will in the future apply the rule in a manner that deters *bona fide* lawsuits does not justify striking down the rule *en toto* at this time.

IV

We hold that USWA's rule prohibiting candidates for union office from accepting campaign contributions from nonmembers does not violate § 101(a)(2). Although it may interfere with rights Congress intended to protect, it is rationally related to a legitimate and protected purpose, and thus is sheltered by the proviso to § 101(a)(2). We reverse the decision below and remand for further proceedings consistent with this opinion.

It is so ordered.

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[15] The Court of Appeals refused to accept this construction. 645 F. 2d, at 1119. However, it is consistent with the language of the regulation and is also supported by the Committee's opinion. See TAN & note 14 *supra*.

[16] Respondents also argue that the decision below can be affirmed on the ground that the outsider rule violates the First Amendment because it interferes with members' and nonmembers' Constitutional rights of free speech and free association. However, the union's decision to adopt an outsider rule does not involve state action. See *United Steelworkers of America* v. *Weber*, 443 U. S. 193, 200 (1979).

SUPREME COURT OF THE UNITED STATES

No. 81-395

UNITED STEELWORKERS OF AMERICA, AFL-CIO-CLC, PETITIONER *v.* EDWARD SADLOWSKI, JR., ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

[June 14, 1982]

JUSTICE WHITE, with whom THE CHIEF JUSTICE, JUSTICE BRENNAN, and JUSTICE BLACKMUN join, dissenting.

The question before us is what Congress intended when in 1959 it passed § 101(a)(2), the Bill of Rights provision of the LMRDA. That question is best answered by identifying the problem that Congress intended to solve by adopting the provision. The answer, in turn, is not at all difficult to discover.

After long and careful examination and hearings dealing with the labor union movement, Congress found that too often unions were run by entrenched, corrupt leaders who maintained themselves and discouraged challenge by any means available, including violence and threats.[1] As Senator McClellan explained: "[T]he records of our committee's investigations show over and over again that a rank-and-file member dare not risk any opposition to a corrupt or autocratic leadership. If he does, he may be beaten, his family threatened, his property destroyed or damaged, and he may be forced out of his job—all of these things can happen and have happened." 105 Cong. Rec. 5806 (1959). And again, "Members had better not offer any competition. They had better not seek election. That had better not aspire to the presidency or the secretaryship, or they will be expelled or disciplined." *Id.* at 6478.

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[1] The Court of Appeals in this case summarized these findings:

"Prior to the enactment of the LMRDA in 1959 the Select Senate Committee ferreted out widespread corruption, dictatorship and racketeering in a number of large international unions. The Committee found that the President of the Bakery and Confectionary Workers' International Union of America had 'railroaded through changes in the union constitution which destroyed any vestigial pretenses of union democracy.' Select Committee Report, [S. Rep.No.1417, 85th Cong., 2d Sess.] 129 [1958]. It reported that Dave Beck, General President of the International Brotherhood of Teamsters 'shamefully enriched himself at [the] expense [of the union members] and that in the final instance he capitulated to the forces within the union who promoted the interests of racketeers and hoodlums.' *Id.* at 84. The Committee likewise found Teamster officials joining with others to take over illegal gambling operations with an 'underworld combine,' *id.*

This was the problem that Congress meant to solve. As Senator McClellan stated, its goal was to end "autocratic rule by placing the ultimate power in the hands of the members, where it rightfully belongs so that they may be ruled by their free consent, may bring about a regeneration of union leadership. I believe the union should be returned to those whom they were designed to serve; they should not be left to the hands of those who act as masters." 2 Legislative History of the LMRDA (NLRB 1959) 1099.

What Congress then did was to guarantee the union member's right to run for election, § 401(e), and to guarantee him freedom of speech and assembly. § 101(a)(2). There is no question, and the Court concedes as much, that the Act created statutory protection for the union member's right effectively to run for union office. Without doubt, § 101(a)(2) was not only aimed at protecting the member who speaks his

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at 38–39, and the top officers of the United Textile Workers of America avariciously misappropriating union funds, *id.* at 159. 'Democracy [was] virtually nonexistent' in the International Union of Operating Engineers because the union was ruthlessly dominated through 'violence, intimidation and other dictatorial practices.' *Id.* at 437. Practices in the Teamsters 'advanced the cause of union dictatorship.' *Id.* at 444. The Committee cited other similar instances of widespread abuses in its 462-page Report." *Sadlowski* v. *United Steelworkers of America*, 645 F. 2d 114, 1124 (CADC 1981).

mind on union affairs, even if critical of the leadership, but was also "specifically designed to protect the union member's right to seek higher office within the union." *Hall* v. *Cole*, 412 U. S. 1, 14 (1973). The LMRDA was a major effort by Congress "to insure union democracy." S. Rep. No. 187, 86th Cong., 1st Sess. 2 (1959). The chosen instrument for curbing the abuses of entrenched union leadership was "free and democratic elections." *Steelworkers* v. *Usery*, 429 U. S. 305, 309 (1977). The abuses of "entrenched union leadership" were to be curbed, among other means, by the "check of democratic elections." *Wirtz* v. *Hotel Employees*, 391 U. S. 492, 499 (1968). These elections were to be modeled on the "political elections in this country." *Wirtz* v. *Hotel Employees*, *supra*, at 504; *Steelworkers* v. *Usery*, *supra*, at 309.

The member's right to run for office and to speak and assemble was to be subject to reasonable union rules, but the reasonableness of a particular rule must surely be judged with reference to the paradigmatic situation that Congress intended to address by guaranteeing free elections: a large union with entrenched, autocratic leadership bent on maintaining itself by fair means or foul. We do not by any means suggest that the USWA had or has the characteristics that led to the enactment of § 101(a)(2), but it is clear that the section should be construed with reference to those unions with the kind of leadership that caused the congressional response. Such a leadership is not only determined to discourage opposition; it also has at its disposal all of the advantages of incumbency for doing so, including the facilities of the union. Those leaders have normally appointed the union staff, the bureaucracy that makes the union run. The staff is dependent upon and totally loyal to the leadership. It amounts to a built-in campaign organization that can be relied upon to make substantial contributions and to solicit others for more. Such a management is in control of the union's communication system and has immediate access to membership lists and to the members themselves. Obviously, even if the incumbents eschew violence, threats or intimidation, mounting an effective challenge would be a large and difficult endeavor. And if those in office are as unscrupulous as Congress often found them to be, the dimensions of the task facing the insurgent are exceeedingly large. But Congress intended to help the members help solve these very difficulties by guaranteeing them the right to run for office and to have free and open elections in the American tradition.

It is incredible to me that the union rule at issue in this case can be found to be a reasonable restriction on the right of Edward Sadlowski to speak, assemble, and run for union office in a free and democratic election. The scope and stringency of the rule cannot be doubted. It forbids any candidate for union office and his supporters from soliciting or accepting financial support from any non-member. The candidate cannot accept contributions from members of his family, relatives, friends, or well-wishers unless they are members of the union. Retired members such as Edward Sadlowski, Sr., may not contribute; neither may members not in good standing. Even a fully secured loan from a non-member with a standard rate of interest is forbidden under the rule. The rule goes even further. It forbids the acceptance of "any other direct or indirect support of any kind from any non-member", except an individual's volunteered personal time.[2] The regulations issued under the rule clearly

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[2] The regulations specify:

"'Financial Support' means a direct or indirect contribution where the purpose, object or foreseeable effect of the support is to influence the election of a candidate. Financial support includes, but is not limited to:

1. Contributions of money, securities, or any material thing of value;
2. Payments to or subscription for fund raising events of any kind (e. g. raffles, dinners, beer or cocktail parties and so forth);
3. Discounts in the price or cost of goods or services, except to the extent that commercially established discounts are generally available to the customers of the supplier;

show that the union intends to prohibit, as far as it is within its power to do so, all non-member contributions on behalf of a member running for union office. These regulations specify:

> "When prohibited support is contributed, there will be a presumption that it was accepted by the candidate or his or his supporters, unless they have taken affirmative steps in good faith to dissuade the non-member from providing such support and have taken action to correct the effects of the prohibited support." App. 494.[3]

A candidate unable to rebut this presumption may be disqualified, fined, suspended, or expelled. This is a draconian rule. How could any candidate "correct the effects of the prohibited support"? The rule thus goes far beyond the

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4. Extension of credits, loans, and other similar forms of finance, except when obtained in the regular course of business of a commercial lending institution and on such terms and conditions as are regularly required by such institutions; and

5. The payment for the personal services of another person, or for the use of building or office space, equipment or supplies, or advertisements through the media." App. 492.

The regulations also explain that "[e]xamples of indirect support from non-members would include the contribution of cash to a member who in turn makes a contribution to a candidate; the donation of travel expenses, printing services, office supplies, office space, or of clerical secretarial, or professional services used by a non-member in conjunction with his or her own volunteered service to a candidate; the distribution of election materials with the aid of a volunteer's paid staff; and the procuring of discounts." App. 494.

[3] The regulation continues,

"In such cases where prohibited support has been contributed, it is the candidate's obligation to contact immediately the non-member contributor, reject the prohibited support, return the contribution, insist that such support be discontinued, and take whatever action on his own or her own, or as directed by the Committee, may be necessary to eliminate any impact on the election. Full reports must be made to the Committee promptly." App. 494–495.

limitations on contributions approved in *Buckley* v. *Valeo*, 424 U. S. 1 (1976), and severely limits expenditures as well. The candidate may actually be denied his statutory right to run for office because non-members have exercised their own First Amendment rights.

The impact of the rule with respect to Edward Sadiowski, Sr., illustrates the rigor of the rule. It prohibits him from contributing to the campaign of Edward Sadlowski, Jr., even though the elder Sadlowski is the father of the candidate, was a charter member of the USWA, remained a member for 32 years prior to his retirement, and receives a USWA pension, the terms of which are negotiated by USWA's officers.

Restrictions such as this are a far cry from the free and open elections that Congress anticipated and are wholly inconsistent with the way elections have been run in this country. The Court has long recognized the close relationship between the ability to solicit funds and the ability to express views. "[W]ithout solicitation, the flow of . . . information and advocacy would likely cease." *Village of Schaumberg* v. *Citizens for a Better Environment*, 444 U. S. 620, 632 (1980). See also *Schneider* v. *State*, 308 U. S. 147 (1939); *Cantwell* v. *Connecticut*, 310 U. S. 296 (1940); *Virginia Pharmacy Board* v. *Virginia Consumers Council*, 425 U. S. 748, 861 (1976); *Bates* v. *State Bar of Arizona*, 433 U. S. 350, 363 (1977).

In *Thomas* v. *Collins*, 323 U. S. 516 (1945), the Court held that the First Amendment barred enforcement of a state statute requiring a permit before soliciting membership in any labor organization. Solicitation and speech were deemed to be so intertwined that a prior permit could not be required. The Court conceded that the "collection of funds" might be subject to reasonable regulation, but concluded that such regulation "must be done and the restriction applied, in such a manner as not to intrude upon the rights of free speech and assembly." *Id.* at 540–541.

Specifically with regard to elections and campaign financing, the Court observed in *Buckley* v. *Valeo*, *supra*, at 19:

> "A restriction on the amount of money a person or group can spend on political communication during a campaign necessarily reduces the quantity of expression by restricting the number of issues discussed, the depth of their exploration, and the size of the audience reached. This is because virtually every means of communicating ideas in today's mass society requires the expenditure of money. The distribution of the humblest handbill or leaflet entails printing, paper, and circulation costs. Speeches and rallies generally necessitate hiring a hall and publicizing the event." (footnote omitted).

Thus, as the Court of Appeals recognized in this case "contribution restrictions could have a severe impact on political dialogue if the limitations prevented candidates and political committees from amassing the resources necessary for 'effective advocacy.'" 645 F. 2d at 1122, quoting 424 U. S. at 21.

It goes without saying that running for office in a union with 1.3 million members spread throughout the United States and Canada requires a substantial war chest if the campaign is to be effective and to have any reasonable chance of succeeding. Attempting to unseat the incumbents of union office is a substantial undertaking. As we noted in *United Steelworkers* v. *Usery*, *supra*, at 311, there is no permanent opposition party within the union. There is only a one-party system consisting of the union's incumbent officers and hired staff all controlled from the top down. "The full-time officers collectively, under the direction of the top officer, constitute the sole political machine for the preservation of their offices and power." Edelstein and Warner, Comparative Union Democracy, p. 39 (1979). The union involved in this case has some 30 elected positions, its presidents appoints more than 1,500 office and field staff and salaries and expenses for union personnel in 1978 totalled over 37 million dollars. App. 141.

Thus, in the best of circumstances, the role of the challenger is very difficult. And if one keeps in mind that Congress intended to give the challenger a fair chance even in a union controlled by unscrupulous leaders with an iron grip on the staff and a willingness to employ means both within and without the law, it is wholly unrealistic to confine the challenger to financial support garnered within the union. Surely, Congress never intended that a union should be permitted to impose such a limitation. As Clyde Summers, a recognized authority in this field, stated in this case on behalf of Sadlowski:

> "Opposition candidates customarily finance their campaigns in the first instances out of their own pockets and out of loans or gifts from friends. They get contributions from sympathetic union members, but at the beginning they may have few open supporters and they do not have a large organization to solicit contributions. They have to do enough publicizing and campaigning to make themselves appear as a viable candidate before they begin to get support from any substantial number of members. Even then, the individual contributions of members is inevitably small. Seldom it is enough to mount a really substantial campaign, and is almost never enough to match the resource of the incumbents." App. 156.
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> "In my opinion, the practical effect of prohibiting all contributions to union election campaigns except those made by union members would be to gravely damage, if not destroy the possibility of democratic elections in unions, particularly in large local unions and in international unions—if opposition groups are barred from getting any help from outside, they can, in most situations, have no hopes of mounting an effective campaign." App. 160.[4]

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[4] The following is a summary of other relevant views present by Mr. Summers, J. A. 152–160:

Incumbents in unions elections have four crucial advantages:

"First, and most important, they have control of the paid staff of repre-

In addressing itself to union elections, Congress forbade union and employer contributions, but went no further in restricting contributions or expenditures to or on behalf of union candidates for office. The majority emphasizes that Congress was concerned about the control of unions by outsiders and asserts that the challenged rule serves the congressional purpose. It is true, as Senator McClellan ex-

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sentatives or business agents who provide the back-bone of the incumbent's political organization. The paid staff owe their jobs to the officers, take orders from the officers and can be dismissed by the officers. . . . Second, the incumbent officers have control of the union newspapers. There is no such thing as a free and independent press within the union. . . . Third, the incumbents have ready access to members." They have immediate access to names, addresses and telephone numbers of union members. "The law requires equal access to membership lists but there is no practical equality when the incumbent administration includes the secretary-treasurer of the union. Fourth, the officers have access to legal services at the union's expenses.

"These advantages are critical when one considers the financing of union election campaigns. . . . The incumbent officers have a paid built-in campaign organization in the paid staff representatives. . . . In short, incumbents can run a campaign with little or no money," while the opposition must have substantial funds even to get started. For incumbents, the largest single source is the paid staff, and it is quite unrealistic to expect opposition candidates to obtain substantial support from staff representatives who are contributing to those to whom they owe their jobs. Incumbents also raise funds from union members, and in doing so they have a marked advantage over insurgent candidates. Incumbents also raise funds through testimonial dinners given in their honor. Opposition candidates cannot successfully match this effort.

"Union candidates' acceptance of money and other help from sources outside the union is common and accepted practice. . . . up until the last two years, no one, and I would emphasize no one, seriously suggested that there was anything inappropriate about union candidates soliciting financial support from non-members. . . . Union constitutions placed no such restrictions on such contributions. . . . Only within the last two years has the Steelworkers placed such a restriction in its constitution and this seems to be part of an effort of the administration to void any effective challenge by an opposition candidate in the future."

plained, that "impositions and abuses . . . have been perpetrated upon the working people of many of our states by the thugs who have muscled into positions of power in labor unions and who masquerade [as] labor leaders and as friend of working people. . . ." 2 Leg. Hist. of the LMRDA 1097. But the remedy which he proposed and which was adopted was to end "autocratic rule by placing the ultimate power in the hands of the members," *id.*, at 1099, and by giving them sufficient statutory protection to participate in a fair election to unseat an entrenched leadership.

Yet the majority somehow finds the absolute, unbending, no-contribution rule to be a reasonable regulation of a member's right to seek office and of the free and open elections that Congress anticipated. This, in spite of the availability of other means to satisfy the union's legitimate concerns about outsiders controlling their affairs through those whose campaigns they have financed. A requirement of disclosure of all contributions, together with a ceiling on contributions, would avoid outside corruption without trampling on the rights of members to raise reasonable sums for election campaigns. Such rules would honor both purposes of the legislation: protecting against outside influence and empowering members to express their views and to challenge established leadership. As I see it, the rule at issue contradicts the values the statute was designed to protect and thwarts its purpose.

I respectfully dissent.

All issues available have been filmed.
Unfortunately, any scattered missing issues are no longer available.

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981/81-406

(Slip Opinion)

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Lumber Co.*, 200 U. S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

MISSISSIPPI UNIVERSITY FOR WOMEN ET AL. *v.* HOGAN

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 81-406. Argued March 22, 1982—Decided July 1, 1982

Held: The policy of petitioner Mississippi University for Women (MUW), a state-supported university which has from its inception limited its enrollment to women, of denying otherwise qualified males (such as respondent) the right to enroll for credit in its School of Nursing violates the Equal Protection Clause of the Fourteenth Amendment. Pp. 5–14.

(a) The party seeking to uphold a statute that classifies individuals on the basis of their gender must carry the burden of showing an "exceedingly persuasive justification" for the classification. *Kirchberg* v. *Feenstra*, 450 U. S. 455, 461; *Personnel Administrator of Mass.* v. *Feeney*, 442 U. S. 256, 273. The burden is met only by showing at least that the classification serves "important governmental objectives and that the discriminatory means employed" are "substantially related to the achievement of those objectives." *Wengler* v. *Druggists Mutual Insurance Co.*, 446 U. S. 142, 150. The test must be applied free of fixed notions concerning the roles and abilities of males and females. Pp. 5–8.

(b) The single-sex admissions policy of MUW's School of Nursing cannot be justified on the asserted ground that it compensates for discrimination against women and, therefore, constitutes educational affirmative action. A State can evoke a compensatory purpose to justify an otherwise discriminatory classification only if members of the gender benefited by the classification actually suffer a disadvantage related to the classification. Rather than compensating for discriminatory barriers faced by women, MUW's policy tends to perpetuate the stereotyped view of nursing as an exclusively woman's job. Moreover, the State has not shown that the gender-based classification is substantially and directly related to its proposed compensatory objective. To the contrary, MUW's policy of permitting men to attend classes as auditors fatally un-

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dermines its claim that women, at least those in the School of Nursing, are adversely affected by the presence of men. Thus, the State has fallen far short of establishing the "exceedingly persuasive justification" needed to sustain the gender-based classification. Pp. 8–13.

(c) Nor can the exclusion of men from MUW's School of Nursing be justified on the basis of the language of § 901(a)(5) of Title IX of the Education Amendments of 1972, which exempts from § 901(a)'s general prohibition of gender discrimination in federally funded education programs the admissions policies of public institutions of undergraduate higher education "that traditionally and continually from [their] establishment [have] had a policy of admitting only students of one sex." It is not clear that, as argued by the State, Congress enacted the statute pursuant to its power granted by § 5 of the Fourteenth Amendment to enforce that Amendment, and thus placed a limitation upon the broad prohibitions of the Equal Protection Clause. Rather, Congress apparently intended, at most, to create an exemption from Title IX's requirements. In any event, Congress' power under § 5 "is limited to adopting measures to enforce the guarantees of the Amendment; § 5 grants Congress no power to restrict, abrogate, or dilute these guarantees." *Katzenbach* v. *Morgan*, 384 U. S. 641, 651, n. 10. Pp. 13–14.

646 F. 2d 1116 and 653 F. 2d 222, affirmed.

O'CONNOR, J., delivered the opinion of the Court, in which BRENNAN, WHITE, MARSHALL, and STEVENS, JJ., joined. BURGER, C. J., and BLACKMUN, J., filed dissenting opinions. POWELL, J., filed a dissenting opinion, in which REHNQUIST, J., joined.

NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D.C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

SUPREME COURT OF THE UNITED STATES

No. 81-406

MISSISSIPPI UNIVERSITY FOR WOMEN, ET AL., PETITIONERS *v.* JOE HOGAN

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

[July 1, 1982]

JUSTICE O'CONNOR delivered the opinion of the Court.

This case presents the narrow issue of whether a state statute that excludes males from enrolling in a state-supported professional nursing school violates the Equal Protection Clause of the Fourteenth Amendment.

I

The facts are not in dispute. In 1884, the Mississippi legislature created the Mississippi Industrial Institute and College for the Education of White Girls of the State of Mississippi, now the oldest state-supported all-female college in the United States. 1884 Miss. Gen. Laws, Ch. XXX, §6. The school, known today as Mississippi University for Women (MUW), has from its inception limited its enrollment to women.[1]

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[1] The charter of MUW, basically unchanged since its founding, now provides:
"The purpose and aim of the Mississippi State College for Women is the moral and intellectual advancement of the girls of the state by the maintenance of a first-class institution for their education in the arts and sciences, for their training in normal school methods and kindergarten, for their instruction in bookkeeping, photography, stenography, telegraphy, and typewriting, and in designing, drawing, engraving, and painting, and their industrial application, and for their instruction in fancy, general, and practical needlework, and in such other industrial branches as experience, from

In 1971, MUW established a School of Nursing, initially offering a two-year associate degree. Three years later, the school instituted a four-year baccalaureate program in nursing and today also offers a graduate program. The School of Nursing has its own faculty and administrative officers and establishes its own criteria for admission.[2]

Respondent, Joe Hogan, is a registered nurse but does not hold a baccalaureate degree in nursing. Since 1974, he has worked as a nursing supervisor in a medical center in Columbus, the city in which MUW is located. In 1979, Hogan applied for admission to the MUW School of Nursing's baccalaureate program.[3] Although he was otherwise qualified, he was denied admission to the School of Nursing solely because of his sex. School officials informed him that he could audit the courses in which he was interested, but could not enroll for credit. Tr. 26.[4]

Hogan filed an action in the United States District Court for the Northern District of Mississippi, claiming the single-sex admissions policy of MUW's School of Nursing violated the Equal Protection Clause of the Fourteenth Amendment. Hogan sought injunctive and declaratory relief, as well as compensatory damages.

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time to time, shall suggest as necessary or proper to fit them for the practical affairs of life." Miss. Code Ann. § 37-117-3 (1972).

Mississippi maintains no other single-sex public university or college. Thus, we are not faced with the question of whether States can provide "separate but equal" undergraduate institutions for males and females. *Cf. Vorchheimer* v. *School District of Philadelphia*, 532 F. 2d 880 (CA3 1975), aff'd by an equally divided court, 430 U. S. 703 (1977).

[2] Record, Exhibit 1, 1980–1981 Bulletin of Mississippi University for Women 31–34, 212–229.

[3] With a baccalaureate degree, Hogan would be able to earn a higher salary and would be eligible to obtain specialized training as an anesthetist. Tr. 18.

[4] Dr. James Strobel, President of MUW, verified that men could audit the equivalent of a full classload in either night or daytime classes. Tr. 39–40.

Following a hearing, the District Court denied preliminary injunctive relief. App. to Pet. for Cert. A4. The court concluded that maintenance of MUW as a single-sex school bears a rational relationship to the state's legitimate interest "of providing the greatest practical range of educational opportunities for its female student population." *Id.*, at A3. Furthermore, the court stated, the admissions policy is not arbitrary because providing single-sex schools is consistent with a respected, though by no means universally accepted, educational theory that single-sex education affords unique benefits to students. *Ibid.* Stating that the case presented no issue of fact, the court informed Hogan that it would enter summary judgment dismissing his claim unless he tendered a factual issue. When Hogan offered no further evidence, the District Court entered summary judgment in favor of the State. Record 73.

The Court of Appeals for the Fifth Circuit reversed, holding that, because the admissions policy discriminates on the basis of gender, the District Court improperly used a "rational relationship" test to judge the constitutionality of the policy. 646 F. 2d 1116, 1118. Instead, the Court of Appeals stated, the proper test is whether the State has carried the heavier burden of showing that the gender-based classification is substantially related to an important governmental objective. *Id.*, at 1118, 1119. Recognizing that the State has a significant interest in providing educational opportunities for all its citizens, the court then found that the State had failed to show that providing a unique educational opportunity for females, but not for males, bears a substantial relationship to that interest. *Id.*, at 1119. Holding that the policy excluding Hogan because of his sex denies him equal protection of the laws, the court vacated the summary judgment entered against Hogan as to his claim for monetary damages, and remanded for entry of a declaratory judgment in conformity with its opinion and for further appropriate proceedings. *Id.*, at 1119–1120.

On rehearing, the State contended that Congress, in enacting § 901(a)(5) of Title IX of the Education Amendments of 1972, Pub. L. 92–318, 86 Stat. 373, 20 U. S. C. § 1681 *et seq.*, expressly had authorized MUW to continue its single-sex admissions policy by exempting public undergraduate institutions that traditionally have used single-sex admissions policies from the gender discrimination prohibition of Title IX.[5] Through that provision, the State argued, Congress limited the reach of the Fourteenth Amendment by exercising its power under § 5 of the Amendment.[6] The Court of Appeals rejected the argument, holding that § 5 of the Fourteenth Amendment does not grant Congress power to authorize States to maintain practices otherwise violative of the Amendment. 653 F. 2d 223.

We granted certiorari, —— U. S. ——, and now affirm the judgment of the Court of Appeals.[7]

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[5] Section 901(a) of Title IX, Education Amendments of 1972, Pub. L. 92–318, 86 Stat. 373, 20 U. S. C. § 1681(a) (§ 1681), provides in part:

"(a) No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance, except that:

"(1) in regard to admissions to educational institutions, this section shall apply only to institutions of vocational education, professional education, and graduate higher education, and to public institutions of undergraduate higher education;

* * * * *

"(5) in regard to admissions this section shall not apply to any public institution of undergraduate higher education which is an institution that traditionally and continually from its establishment has had a policy of admitting only students of one sex. . . ."

[6] Section 5 of the Fourteenth Amendment provides:

"The Congress shall have power to enforce, by appropriate legislation, the provisions of this article."

[7] Although some statements in the Court of Appeals' decision refer to all schools within MUW, see 646 F. 2d, at 1119, the factual underpinning of Hogan's claim for relief involved only his exclusion from the nursing program, Complaint ¶ 8–10, and the Court of Appeals' holding applies only to Hogan's individual claim for relief. 646 F. 2d, at 1119–1120. Addition-

II

We begin our analysis aided by several firmly-established principles. Because the challenged policy expressly discriminates among applicants on the basis of gender, it is subject to scrutiny under the Equal Protection Clause of the Fourteenth Amendment. *Reed* v. *Reed*, 404 U. S. 71, 75 (1971). That this statute discriminates against males rather than against females does not exempt it from scrutiny or reduce the standard of review.[8] *Caban* v. *Mohammed*, 441 U. S. 380, 394 (1979); *Orr* v. *Orr*, 440 U. S. 268, 279 (1979). Our decisions also establish that the party seeking to uphold a statute that classifies individuals on the basis of their gender must carry the burden of showing an "exceedingly persuasive justification" for the classification. *Kirchberg* v. *Feenstra*, 450 U. S. 455, 461 (1981); *Personnel Administrator of Massachusetts* v. *Feeney*, 442 U. S. 256, 273 (1979). The burden is met only by showing at least that the classifica-

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ally, during oral argument, counsel verified that Hogan sought only admission to the School of Nursing. Tr. of Oral Argument 24. Because Hogan's claim is thus limited, and because we review judgments, not statements in opinions, *Black* v. *Cutter Laboratories*, 351 U. S. 292 (1956), we decline to address the question of whether MUW's admissions policy, as applied to males seeking admission to schools other than the School of Nursing, violates the Fourteenth Amendment.

[8] Without question, MUW's admissions policy worked to Hogan's disadvantage. Although Hogan could have attended classes and received credit in one of Mississippi's state-supported coeducational nursing programs, none of which was located in Columbus, he could attend only by driving a considerable distance from his home. Tr. 19–20, 63–65. A similarly situated female would not have been required to choose between foregoing credit and bearing that inconvenience. Moreover, since many students enrolled in the School of Nursing hold full-time jobs, Deposition of Dean Annette K. Barrar 29–30, Hogan's female colleagues had available an opportunity, not open to Hogan, to obtain credit for additional training. The policy of denying males the right to obtain credit toward a baccalaureate degree thus imposed upon Hogan "a burden he would not bear were he female." *Orr* v. *Orr*, 440 U. S. 268, 273 (1979).

tion serves "important governmental objectives and that the discriminatory means employed" are "substantially related to the achievement of those objectives." *Wengler* v. *Druggists Mutual Insurance Co.*, 446 U. S. 142, 150 (1980).[9]

Although the test for determining the validity of a gender-based classification is straightforward, it must be applied free of fixed notions concerning the roles and abilities of males and females. Care must be taken in ascertaining whether the statutory objective itself reflects archaic and stereotypic notions. Thus, if the statutory objective is to exclude or "protect" members of one gender because they are presumed to suffer from an inherent handicap or to be innately inferior, the objective itself is illegitimate. See *Frontiero* v. *Richardson*, 411 U. S. 677, 684–685 (1973) (plurality opinion).[10]

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[9] In his dissenting opinion, JUSTICE POWELL argues that a less rigorous test should apply because Hogan does not advance a "serious equal protection claim. . . ." *Post*, at 6, 8. JUSTICE BLACKMUN, without proposing an alternative test, labels the test applicable to gender-based discrimination as "rigid" and productive of "needless conformity." *Post*, at 2. Our past decisions establish, however, that when a classification expressly discriminates on the basis of gender, the analysis and level of scrutiny applied to determine the validity of the classification do not vary simply because the objective appears acceptable to individual members of the Court. While the validity and importance of the objective may affect the outcome of the analysis, the analysis itself does not change.

Thus, we apply the test previously relied upon by the Court to measure the constitutionality of gender-based discrimination. Because we conclude that the challenged statutory classification is not substantially related to an important objective, we need not decide whether classifications based upon gender are inherently suspect. See *Stanton* v. *Stanton*, 421 U. S. 7, 13 (1975).

[10] History provides numerous examples of legislative attempts to exclude women from particular areas simply because legislators believed women were less able than men to perform a particular function. In 1872, this Court remained unmoved by Myra Bradwell's argument that the Fourteenth Amendment prohibited a State from classifying her as unfit to practice law simply because she was female. *Bradwell* v. *Illinois*, 16 Wall. 130 (1872). In his concurring opinion, Justice Bradley described the reasons underlying the State's decision to determine which positions only men

If the State's objective is legitimate and important, we next determine whether the requisite direct, substantial relationship between objective and means is present. The purpose of requiring that close relationship is to assure that the validity of a classification is determined through reasoned analysis rather than through the mechanical application of traditional, often inaccurate, assumptions about the proper roles of men and women.[11] The need for the requirement is

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could fill:

"It is the prerogative of the legislator to prescribe regulations founded on nature, reason, and experience for the due admission of qualified persons to professions and callings demanding special skill and confidence. This fairly belongs to the police power of the State; and, in my opinion, in view of the peculiar characteristics, destiny, and mission of woman, it is within the province of the legislature to ordain what offices, positions, and callings shall be filled and discharged by men, and shall receive the benefit of those energies and responsibilities, and that decision and firmness which are presumed to predominate in the sterner sex." *Id.*, at 142.

In a similar vein, the Court in *Goesaert* v. *Cleary*, 335 U. S. 464, 466 (1948), upheld a legislature's right to preclude women from bartending, except under limited circumstances, on the ground that the legislature could devise preventive measures against "moral and social problems" that result when women, but apparently not men, bartend. Similarly, the many protective labor laws enacted in the late nineteenth and early twentieth centuries often had as their objective the protection of weaker workers, which the laws assumed meant females. See generally, B. Brown, A. Freedman, H. Katz, & A. Price, Women's Rights and the Law 209–210 (1977).

[11] For instance, in *Stanton* v. *Stanton*, *supra*, this Court invalidated a state statute that specified a greater age of majority for males than for females and thereby affected the period during which a divorced parent was responsible for supporting his children. We did not question the importance or validity of the State's interest in defining parents' obligation to support children during their minority. On analysis, however, we determined that the purported relationship between that objective and the gender-based classification was based upon traditional assumptions that "the female [is] destined solely for the home and the rearing of the family, and only the male for the marketplace and the world of ideas. . . . If a specified age of minority is required for the boy in order to assure him parental support while he attains his education and training, so, too, is it for the girl." 421 U. S., at 14–15. Once those traditional notions were aban-

amply revealed by reference to the broad range of statutes already invalidated by this Court, statutes that relied upon the simplistic, outdated assumption that gender could be used as a "proxy for other, more germane bases of classification," *Craig* v. *Boren*, 429 U. S. 190, 198 (1976), to establish a link between objective and classification.[12]

Applying this framework, we now analyze the arguments advanced by the State to justify its refusal to allow males to enroll for credit in MUW's School of Nursing.

III

A

The State's primary justification for maintaining the single-sex admissions policy of MUW's School of Nursing is that it compensates for discrimination against women and, therefore, constitutes educational affirmative action. Pet. Brief 8.[13] As applied to the School of Nursing, we find the State's argument unpersuasive.

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doned, no basis for finding a substantial relationship between classification and objective remained.

[12] See, *e. g.*, *Kirchberg* v. *Feenstra*, 450 U. S. 455 (1981) (statute granted only husbands the right to manage and dispose of jointly owned property without the spouse's consent); *Wengler* v. *Druggists Mutual Insurance Co.*, 446 U. S. 142 (1980) (statute required a widower, but not a widow, to show he was incapacitated from earning to recover benefits for a spouse's death under workers' compensation laws); *Orr* v. *Orr*, *supra* (only men could be ordered to pay alimony following divorce); *Craig* v. *Boren*, 429 U. S. 190 (1976) (women could purchase "nonintoxicating" beer at a younger age than could men); *Stanton* v. *Stanton*, *supra* (women reached majority at an earlier age than did men); *Weinberger* v. *Wiesenfeld*, 420 U. S. 636 (1975) (widows, but not widowers, could collect survivors' benefits under the Social Security Act); *Frontiero* v. *Richardson*, 411 U. S. 677 (1973) (determination of spouse's dependency based upon gender of member of armed forces claiming dependency benefits); *Reed* v. *Reed*, 404 U. S. 71 (1971) (statute preferred men to women as administrators of estates).

[13] In its Reply Brief, the State understandably retreated from its contention that MUW was founded to provide opportunities for women which were not available to men. Reply Brief 4. Apparently, the impetus for founding MUW came not from a desire to provide women with advantages

In limited circumstances, a gender-based classification favoring one sex can be justified if it intentionally and directly assists members of the sex that is disproportionately burdened. See *Schlesinger v. Ballard*, 419 U. S. 498 (1975). However, we consistently have emphasized that "the mere recitation of a benign, compensatory purpose is not an automatic shield which protects against any inquiry into the actual purposes underlying a statutory scheme." *Weinberger* v. *Wiesenfeld*, 420 U. S. 636, 648 (1975). The same searching analysis must be made, regardless of whether the State's objective is to eliminate family controversy, *Reed* v. *Reed*, *supra*, to achieve administrative efficiency, *Frontiero* v. *Richardson*, *supra*, or to balance the burdens borne by males and females.

It is readily apparent that a State can evoke a compensatory purpose to justify an otherwise discriminatory classifica-

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superior to those offered men, but rather from a desire to provide white women in Mississippi access to state-supported higher learning. In 1856, Sally Reneau began agitating for a college for white women. Those initial efforts were unsuccessful, and, by 1870, Mississippi provided higher education only for white men and black men and women. E. Mayes, History of Education in Mississippi 178, 228, 245, 259, 266, 270 (1899) (hereinafter Mayes). See also S. Neilson, The History of Mississippi State College for Women 4–5 (unpublished manuscript, 1952) (hereinafter Neilson). In 1882, two years before MUW was chartered, the University of Mississippi opened its doors to women. However, the institution was in those early years not "extensively patronized by females; most of those who come being such as desire to qualify themselves to teach." Mayes, at 178. By 1890, the largest number of women in any class at the University had been 23, while nearly 350 women enrolled in the first session of MUW. Mayes, at 178, 253. Because the University did not solicit the attendance of women until after 1920, and did not accept women at all for a time between 1907 and 1920, most Mississippi women who attended college attended MUW. Neilson, at 86. Thus, in Mississippi, as elsewhere in the country, women's colleges were founded to provide some form of higher education for the academically disenfranchised. See generally II T. Woody, A History of Women's Education in the United States 137–223 (1929); L. Baker, I'm Radcliffe! Fly Me! The Seven Sisters and the Failure of Women's Education 22, 136–141 (1976).

tion only if members of the gender benefited by the classification actually suffer a disadvantage related to the classification. We considered such a situation in *Califano* v. *Webster*, 430 U. S. 313 (1977), which involved a challenge to a statutory classification that allowed women to eliminate more low-earning years than men for purposes of computing Social Security retirement benefits. Although the effect of the classification was to allow women higher monthly benefits than were available to men with the same earning history, we upheld the statutory scheme, noting that it took into account that women "as such have been unfairly hindered from earning as much as men" and "work[ed] directly to remedy" the resulting economic disparity. *Id.*, at 318.

A similar pattern of discrimination against women influenced our decision in *Schlesinger* v. *Ballard*, 419 U. S. 498 (1975). There, we considered a federal statute that granted female Naval officers a 13-year tenure of commissioned service before mandatory discharge, but accorded male officers only a nine-year tenure. We recognized that, because women were barred from combat duty, they had had fewer opportunities for promotion than had their male counterparts. By allowing women an additional four years to reach a particular rank before subjecting them to mandatory discharge, the statute directly compensated for other statutory barriers to advancement.

In sharp contrast, Mississippi has made no showing that women lacked opportunities to obtain training in the field of nursing or to attain positions of leadership in that field when the MUW School of Nursing opened its door or that women currently are deprived of such opportunities. In fact, in 1970, the year before the School of Nursing's first class enrolled, women earned 94 percent of the nursing baccalaureate degrees conferred in Mississippi and 98.6 percent of the degrees earned nationwide. United States Department of Health, Education, and Welfare, Earned Degrees Conferred: 1969–1970, 388 (1972). That year was not an aberration; one decade earlier, women had earned all the nursing degrees conferred in Mississippi and 98.9 percent of the degrees conferred nationwide. United States Department of Health, Education, and Welfare, Earned Degrees Conferred 1959–1960: Bachelor's and Higher Degrees 135 (1960). As one would expect, the labor force reflects the same predominance of women in nursing. When MUW's School of Nursing began operation, nearly 98 percent of all employed registered nurses were female.[14] United States Bureau of the Census, 1981 Statistical Abstract of the United States 402 (1981).

Rather than compensate for discriminatory barriers faced by women, MUW's policy of excluding males from admission to the School of Nursing tends to perpetuate the stereotyped view of nursing as an exclusively woman's job.[15] By assuring that Mississippi allots more openings in its state-supported nursing schools to women than it does to men, MUW's admissions policy lends credibility to the old view that women, not men, should become nurses, and makes the assumption that nursing is a field for women a self-fulfilling prophecy. See *Stanton* v. *Stanton*, 421 U. S. 7 (1975). Thus, we conclude that, although the State recited a "benign, compensatory purpose," it failed to establish that the alleged objective is the actual purpose underlying the discriminatory classification.[16]

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[14] Relatively little change has taken place during the past 10 years. In 1980, women received more than 94 percent of the baccalaureate degrees conferred nationwide, National Center for Education Statistics, 1981 Digest of Education Statistics 121 (1981), and constituted 96.5 percent of the registered nurses in the labor force. United States Bureau of the Census, 1981 Statistical Abstract of the United States 402 (1981).

[15] Officials of the American Nurses Association have suggested that excluding men from the field has depressed nurses' wages. Hearings Before the United States Equal Employment Opportunity Commission on Job Segregation and Wage Discrimination 510–511, 517–518, 523 (April 1980). To the extent the exclusion of men has that effect, MUW's admissions policy actually penalizes the very class the State purports to benefit. Cf. *Weinberger* v. *Wiesenfeld*, *supra*.

The policy is invalid also because it fails the second part of the equal protection test, for the State has made no showing that the gender-based classification is substantially and directly related to its proposed compensatory objective. To the contrary, MUW's policy of permitting men to attend classes as auditors fatally undermines its claim that women, at least those in the School of Nursing, are adversely affected by the presence of men.

MUW permits men who audit to participate fully in classes. Additionally, both men and women take part in continuing education courses offered by the School of Nursing, in which regular nursing students also can enroll. Deposition of Dr. James Strobel 56–60 and Deposition of Dean Annette K. Barrar 24–26. The uncontroverted record reveals that admitting men to nursing classes does not affect teaching style, Deposition of Nancy L. Herban 4, that the presence of men in the classroom would not affect the performance of the female nursing students, Tr. 61 and Deposition of Dean Annette K. Barrar 7–8, and that men in coeducational nursing schools do not dominate the classroom. Deposition of Nancy Herban 6. In sum, the record in this case is flatly inconsistent with the claim that excluding men from the School of Nursing is necessary to reach any of MUW's educational goals.

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[16] Even were we to assume that discrimination against women affects their opportunity to obtain an education or to obtain leadership roles in nursing, the challenged policy nonetheless would be invalid, for the State has failed to establish that the legislature intended the single-sex policy to compensate for any perceived discrimination. Cf. *Califano* v. *Webster*, 430 U. S. 313, 318 (1977) (legislative history of the compensatory statute revealed that Congress "directly addressed the justification for differing treatment of men and women" and "purposely enacted the more favorable treatment for female wage earners. . . ."). The State has provided no evidence whatever that the Mississippi legislature has ever attempted to justify its differing treatment of men and women seeking nurses' training. Indeed, the only statement of legislative purpose is that in § 37–118–3 of the Mississippi Code, see n. 1, *supra*, a statement that relies upon the very sort of archaic and overbroad generalizations about women that we have found insufficient to justify a gender-based classification. *E. g., Orr* v. *Orr*, *supra*; *Stanton* v. *Stanton*, *supra*.

Thus, considering both the asserted interest and the relationship between the interest and the methods used by the State, we conclude that the State has fallen far short of establishing the "exceedingly persuasive justification" needed to sustain the gender-based classification. Accordingly, we hold that MUW's policy of denying males the right to enroll for credit in its School of Nursing violates the Equal Protection Clause of the Fourteenth Amendment.[17]

B

In an additional attempt to justify its exclusion of men from MUW's School of Nursing, the State contends that MUW is the direct beneficiary "of specific congressional legislation which, on its face, permits the institution to exist as it has in the past." Pet. Brief 19. The argument is based upon the language of § 901(a) in Title IX of the Education Amendments of 1972, 20 U. S. C. § 1681(a). Although § 901(a) prohibits gender discrimination in education programs that receive federal financial assistance, subsection 5 exempts the admissions policies of undergraduate institutions "that traditionally and continually from [their] establishment [have] had a policy of admitting only students of one sex" from the general prohibition. See n. 5, *supra*. Arguing that Congress enacted Title IX in furtherance of its power to enforce the Fourteenth Amendment, a power granted by § 5 of that Amendment, the State would have us conclude that § 1681(a)(5) is but "a congressional limitation upon the broad prohibitions of the Equal Protection Clause of the Fourteenth Amendment." Pet. Brief 20.

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[17] JUSTICE POWELL's dissent suggests that a second objective is served by the gender-based classification in that Mississippi has elected to provide women a choice of educational environments. *Post*, at 8–10. Since any gender-based classification provides one class a benefit or choice not available to the other class, however, that argument begs the question. The issue is not whether the benefited class profits from the classification, but whether the State's decision to confer a benefit only upon one class by means of a discriminatory classification is substantially related to achieving a legitimate and substantial goal.

The argument requires little comment. Initially, it is far from clear that Congress intended, through § 1681(a)(5), to exempt MUW from any constitutional obligation. Rather, Congress apparently intended, at most, to exempt MUW from the requirements of Title IX.

Even if Congress envisioned a constitutional exemption, the State's argument would fail. Section 5 of the Fourteenth Amendment gives Congress broad power indeed to enforce the command of the Amendment and "to secure to all persons the enjoyment of perfect equality of civil rights and the equal protection of the laws against State denial or invasion. . . ." *Ex parte Virginia*, 100 U. S. 339, 346 (1879). Congress' power under § 5, however, "is limited to adopting measures to enforce the guarantees of the Amendment; § 5 grants Congress no power to restrict, abrogate, or dilute these guarantees." *Katzenbach* v. *Morgan*, 384 U. S. 641, 651 n. 10 (1966). Although we give deference to congressional decisions and classifications, neither Congress nor a State can validate a law that denies the rights guaranteed by the Fourteenth Amendment. See, *e. g.*, *Califano* v. *Goldfarb*, *supra*, at 210; *Williams* v. *Rhodes*, 393 U. S. 23, 29 (1968).

The fact that the language of § 901(a)(5) applies to MUW provides the State no solace: "[A] statute apparently governing a dispute cannot be applied by judges, consistently with their obligations, when such an application of the statute would conflict with the Constitution. *Marbury* v. *Madison*, 1 Cranch 137 (1803)." *Younger* v. *Harris*, 401 U. S. 37, 52 (1971).

IV

Because we conclude that the State's policy of excluding males from MUW's School of Nursing violates the Equal Protection Clause of the Fourteenth Amendment, we affirm the judgment of the Court of Appeals.

It is so ordered.

SUPREME COURT OF THE UNITED STATES

No. 81-406

MISSISSIPPI UNIVERSITY FOR WOMEN, ET AL., PETITIONERS *v.* JOE HOGAN

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

[July 1, 1982]

CHIEF JUSTICE BURGER, dissenting.

I agree generally with JUSTICE POWELL's dissenting opinion. I write separately, however, to emphasize that the Court's holding today is limited to the context of a professional nursing school. *Ante*, at 4–5, n. 7, 8–13. Since the Court's opinion relies heavily on its finding that women have traditionally dominated the nursing profession, see *ante*, at 10–13, it suggests that a State might well be justified in maintaining, for example, the option of an all-women's business school or liberal arts program.

SUPREME COURT OF THE UNITED STATES

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MISSISSIPPI UNIVERSITY FOR WOMEN, ET AL., PETITIONERS *v.* JOE HOGAN

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

[July 1, 1982]

JUSTICE BLACKMUN, dissenting.

Unless Mississippi University for Women wished to preserve an historical anachronism, one only states the obvious when he observes that the University long ago should have replaced its original statement of purpose and brought its corporate papers into the 20th century. It failed to do so and, perhaps in partial consequence, finds itself in this litigation, with the Court's opinion, *ante*, at 1, and n. 1, now taking full advantage of that failure, to MUW's embarrassment and discomfiture.

Despite that failure, times have changed in the intervening 98 years. What was once an "Institute and College" is now a genuine university, with a two-year School of Nursing established 11 years ago and then expanded to a four-year baccalaureate program in 1974. But respondent Hogan "wants in" at this particular location in his home city of Columbus. It is not enough that his State of Mississippi offers baccalaureate programs in nursing open to males at Jackson and at Hattiesburg. Mississippi thus has not closed the doors of its educational system to males like Hogan. Assuming that he is qualified—and I have no reason whatsoever to doubt his qualifications—those doors are open and his maleness alone does not prevent his gaining the additional education he professes to seek.

I have come to suspect that it is easy to go too far with rigid rules in this area of claimed sex discrimination, and to lose—indeed destroy—values that mean much to some people by forbidding the State from offering them a choice while not depriving others of an alternate choice. JUSTICE POWELL in his separate opinion, *post*, advances this theme well.

While the Court purports to write narrowly, declaring that it does not decide the same issue with respect to "separate but equal" undergraduate institutions for females and males, *ante*, at 2, n. 1, or with respect to units of MUW other than its School of Nursing, *ante*, at 4–5, n. 7, there is inevitable spillover from the Court's ruling today. That ruling, it seems to me, places in constitutional jeopardy any state-supported educational institution that confines its student body in any area to members of one sex, even though the State elsewhere provides an equivalent program to the complaining applicant. The Court's reasoning does not stop with the School of Nursing of the Mississippi University for Women.

I hope that we do not lose all values that some think are worthwhile (and are not based on differences of race or religion) and relegate ourselves to needless conformity. The ringing words of the Equal Protection Clause of the Fourteenth Amendment—what JUSTICE POWELL aptly describes as its "liberating spirit," *post*, at 7,—do not demand that price.

SUPREME COURT OF THE UNITED STATES

No. 81-406

MISSISSIPPI UNIVERSITY FOR WOMEN, ET AL., PETITIONERS *v.* JOE HOGAN

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

[July 1, 1982]

JUSTICE POWELL, with whom JUSTICE REHNQUIST joins, dissenting.

The Court's opinion bows deeply to conformity. Left without honor—indeed, held unconstitutional—is an element of diversity that has characterized much of American education and enriched much of American life. The Court in effect holds today that no State now may provide even a single institution of higher learning open only to women students. It gives no heed to the efforts of the State of Mississippi to provide abundant opportunities for young men and young women to attend coeducational institutions, and none to the preferences of the more than 40,000 young women who over the years have evidenced their approval of an all-women's college by choosing Mississippi University for Women (MUW) over seven coeducational universities within the State. The Court decides today that the Equal Protection Clause makes it unlawful for the State to provide women with a traditionally popular and respected choice of educational environment. It does so in a case instituted by one man, who represents no class, and whose primary concern is personal convenience.

It is undisputed that women enjoy complete equality of opportunity in Mississippi's public system of higher education. Of the State's eight universities and 16 junior colleges, all except MUW are coeducational. At least two other Mississippi universities would have provided respondent with the nursing curriculum that he wishes to pursue.[1] No other male has joined in his complaint. The only groups with any personal acquaintance with MUW to file *amicus* briefs are female students and alumnae of MUW. And they have emphatically rejected respondent's arguments, urging that the State of Mississippi be allowed to continue offering the choice from which they have benefited.

Nor is respondent significantly disadvantaged by MUW's all-female tradition. His constitutional complaint is based upon a single asserted harm: that he must *travel* to attend the state-supported nursing schools that concededly are available to him. The Court characterizes this injury as one of "inconvenience." *Ante,* at 5 n. 8. This description is fair and accurate, though somewhat embarrassed by the fact that there is, of course, no constitutional right to attend a state-supported university in one's home town. Thus the Court, to redress respondent's injury of inconvenience, must rest its invalidation of MUW's single-sex program on a mode of "sexual stereotype" reasoning that has no application whatever to the respondent or to the "wrong" of which he complains. At best this is anomolous. And ultimately the anomoly reveals legal error—that of applying a heightened equal protection standard, developed in cases of genuine sexual stereotyping, to a narrowly utilized state classification that provides an *additional* choice for women. Moreover, I believe that Mississippi's educational system should be upheld in this case even if this inappropriate method of analysis is applied.

I

Coeducation, historically, is a novel educational theory. From grade school through high school, college, and graduate and professional training, much of the nation's population during much of our history has been educated in sexually segregated classrooms. At the college level, for instance, until recently some of the most prestigious colleges and universities—including most of the Ivy League—had long histories of single-sex education. As Harvard, Yale, and Princeton remained all-male colleges well into the second half of this century, the "Seven Sister" institutions established a parallel standard of excellence for women's colleges. Of the Seven Sisters, Mount Holyoke opened as a female seminary in 1837 and was chartered as a college in 1888. Vassar was founded in 1865, Smith and Wellsley in 1875, Radcliffe in 1879, Bryn Mawr in 1885, and Barnard in 1889. Mount Holyoke, Smith, and Wellesley recently have made considered decisions to remain essentially single-sex institutions. See Carnegie Commission on Higher Education, Opportunities for Women in Higher Education ("Carnegie Report"), excerpted in B. Babcock, A. Freedman, E. Norton, & S. Ross, Sex Discrimination and the Law 1013, 1014 (1975). Barnard retains its independence from Columbia, its traditional coördinate institution. Harvard and Radcliffe maintained separate admissions policies as recently as 1975.[2]

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[1] "[T]wo other Mississippi universities offered coeducational programs leading to a Bachelor of Science in Nursing—the University of Southern Mississippi in Hattiesburg, 178 miles from Columbus; and the University of Mississippi in Jackson, 147 miles from Columbus . . . ." Brief for Respondent 3. See also Tr. of Oral Arg. 8.

The sexual segregation of students has been a reflection of, rather than an imposition upon, the preference of those subject to the policy. It cannot be disputed, for example, that the highly qualified women attending the leading women's colleges could have earned admission to virtually any college of their choice.[3] Women attending such colleges have chosen to be there, usually expressing a preference for the special benefits of single-sex institutions. Similar decisions were made by the colleges that elected to remain open to women only.[4]

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[2] The history, briefly summarized above, of single-sex higher education in the Northeast is duplicated in other States. I mention only my State of Virginia, where even today Hollins College, Mary Baldwin College, Randolph Macon Woman's College, and Sweet Briar College remain all women's. Each has a proud and respected reputation of quality education.

[3] It is true that historically many institutions of higher education—particularly in the East and South—were single-sex. To these extents, choices were by no means universally available to all men and women. But choices always were substantial, and the purpose of relating the experience of our country with single-sex colleges and universities is to docu-

The arguable benefits of single-sex colleges also continue to be recognized by students of higher education. The Carnegie Commission on Higher Education has reported that it "favor[s] the continuation of colleges for women. They provide an element of diversity . . . and [an environment in which women] generally . . . speak up more in their classes, . . . hold more positions of leadership on campus, . . . and have more role models and mentors among women teachers and administrators." Carnegie Report, *supra*, quoted in K. Davidson, R. Ginsburg, & H. Kay, Sex-Based Discrimination 814 (1975 ed.). A 10-year empirical study by the Cooperative Institutional Research Program of the American Counsel of Education and the University of California, Los Angeles also has affirmed the distinctive benefits of single-sex colleges and universities. As summarized in A. Astin, Four Critical Years 232 (1977), the data established that

> "[b]oth [male and female] single-sex colleges facilitate student involvement in several areas: academic, interaction with faculty, and verbal aggressiveness . . . . Men's and women's colleges also have a positive effect on intellectual self-esteem. Students at single-sex colleges

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ment what should be obvious: generations of Americans, including scholars, have thought—wholly without regard to any discriminatory animus—that there were distinct advantages in this type of higher education.

[4] In announcing Wellesley's decision in 1973 to remain a women's college, President Barbara Newell said that "[t]he research we have clearly demonstrates that women's colleges produce a disproportionate number of women leaders and women in responsible positions in society; it does demonstrate that the higher proportion of women on the faculty the higher the motivation for women students." Carnegie Report, *supra*, in Babcock *et al.*, Sex Discrimination and the Law, at 1014. Similarly rejecting coeducation in 1971, the Mount Holyoke Trustees Committee on Coeducation reported that "the conditions that historically justified the founding of women's colleges" continued to justify their remaining in that tradition. *Ibid.*

are more satisfied than students at coeducational colleges with virtually all aspects of college life . . . . The only area where students are less satisfied is social life."[5]

Despite the continuing expressions that single-sex institutions may offer singular advantages to their students, there is no doubt that coeducational institutions are far more numerous. But their numerical predominance does not establish—in any sense properly cognizable by a court—that individual preferences for single-sex education are misguided or illegitimate, or that a State may not provide its citizens with a choice.[6]

II

The issue in this case is whether a State transgresses the Constitution when—within the context of a public system that offers a diverse range of campuses, curricula, and educational alternatives—it seeks to accommodate the legitimate personal preferences of those desiring the advantages of an all-women's college. In my view, the Court errs seriously by assuming—without argument or discussion—that the equal protection standard generally applicable to sex discrimination is appropriate here. That standard was designed to free women from "archaic and overbroad generalizations . . . ." *Schlesinger* v. *Ballard*, 419 U. S. 498, 508 (1975). In no previous case have we applied it to invalidate state efforts to *expand* women's choices. Nor are there prior sex discrimination decisions by this Court in which a male plaintiff, as in this case, had the choice of an equal benefit.

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[5] In this Court the benefits of single-sex education have been asserted by the students and alumnae of MUW. One would expect the Court to regard their views as directly relevant to this case:

"[I]n the aspect of life known as courtship or mate-pairing, the American female remains in the role of the pursued sex, expected to adorn and groom herself to attract the male. Without comment on the equities of this social arrangement, it remains a sociological fact.

"An institution of collegiate higher learning maintained exclusively for women is uniquely able to provide the education atmosphere in which some, but not all, women can best attain maximum learning potential. It can serve to overcome the historic repression of the past and can orient a woman to function and achieve in the still male dominated economy. It can free its students of the burden of playing the mating game while attending classes, thus giving academic rather than sexual emphasis. Consequently, many such institutions flourish and their graduates make significant contributions to the arts, professions and business." Brief for Mississippi University for Women Alumnae Assn. as *Amicus Curiae* 2–3.

[6] "[T]he Constitution does not require that a classification keep abreast of the latest in educational opinion, especially when there remains a respectable opinion to the contrary . . . . Any other rule would mean that courts and not legislatures would determine all matters of public policy." *Williams* v. *McNair*, 316 F. Supp. 134, 137 (DSC 1970), *aff'd mem.*, 401 U. S. 951 (1971) (quotations and footnotes omitted).

The cases cited by the Court therefore do not control the issue now before us. In most of them women were given no opportunity for the same benefit as men.[7] Cases involving male plaintiffs are equally inapplicable. In *Craig* v. *Boren*, 429 U. S. 190 (1976), a male under 21 was not permitted to buy beer anywhere in the State, and women were afforded no choice as to whether they would accept the "statistically measured but loose-fitting generalities concerning the drinking tendencies of aggregate groups." *Id.*, at 209. A similar situation prevailed in *Orr* v. *Orr*, 440 U. S. 268, 279 (1979), where men had no opportunity to seek alimony from their divorced wives, and women had no escape from the statute's stereotypical announcement of "the State's preference for an allocation of family responsibilities under which the wife plays a dependent role . . . ."[8]

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[7] See *Kirshberg* v. *Feenstra*, 450 U. S. 455, 456 (1981) (invalidating statute "that gave husband, as 'head and master' of property jointly owned with his wife, the unilateral right to dispose of such property without his spouse's consent"); *Wengler* v. *Druggists Mutual Ins. Co.*, 446 U. S. 142, 147 (1980) (invalidating law under which the benefits "that the working woman can expect to be paid to her spouse in the case of her work-related death are less than those payable to the spouse of the deceased male wage earner"); *Stanton* v. *Stanton*, 421 U. S. 7 (1975) (invalidating statute that provided a shorter period of parental support obligation for female children than for male children); *Weinberger* v. *Wiesenfeld*, 420 U. S. 636, 643 (1975) (invalidating statute that failed to grant a woman worker "the same protection which a similarly situated male worker would have received"); *Frontiero* v. *Richardson*, 411 U. S. 677, 683 (1973) (invalidating statute containing a "mandatory preference for male applicants"); *Reed* v. *Reed*, 404 U. S. 71, 74 (1971) (invalidating an "arbitrary preference established in favor of males" in the administration of decedent's estates).

By applying heightened equal protection analysis to this case,[9] the Court frustrates the liberating spirit of the Equal Protection Clause. It forbids the States from providing women with an opportunity to choose the type of university they prefer. And yet it is these women whom the Court regards as the *victims* of an illegal, stereotyped perception of the role of women in our society. The Court reasons this way in a case in which no woman has complained, and the only complainant is a man who advances no claims on behalf of anyone else. His claim, it should be recalled, is not that he is being denied a substantive educational opportunity, or even the right to attend an all-male or a coeducational college. See Brief for Respondent 24.[10] It is *only* that the colleges open to him are located at inconvenient distances.[11]

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[8] See also *Caban* v. *Mohammed*, 441 U. S. 380 (1979) (invalidating law that both denied men the opportunity—given to women—of blocking the adoption of his illegitimate child by means of withholding his consent, and that did not permit women to counter the statute's generalization that the maternal role is more important to women than the paternal role is to men).

[9] Even the Court does not argue that the appropriate standard here is "strict scrutiny"—a standard that none of our "sex discrimination" cases ever has adopted. Sexual segregation in education differs from the tradition, typified by the decision in *Plessy* v. *Ferguson*, 163 U. S. 537 (1896), of "separate but equal" *racial* segregation. It was characteristic of racial segregation that segregated facilities were offered, not as alternatives to increase the choices available to blacks, but as the *sole* alternative. MUW stands in sharp contrast. Of Mississippi's eight public universities and 16 public junior colleges, only MUW considers sex as a criterion for admission. Women consequently are free to select a coeducational education environment for themselves if they so desire; their attendance of MUW is not a matter of coercion.

III

The Court views this case as presenting a serious equal protection claim of sex discrimination. I do not, and I would sustain Mississippi's right to continue MUW on a rational basis analysis. But I need not apply this "lowest tier" of scrutiny. I can accept for present purposes the standard applied by the Court: that there is a gender-based distinction that must serve an important governmental objective by means that are substantially related to its achievement. *E. g.*, *Wengler* v. *Druggists Mutual Ins. Co.*, 446 U. S. 142, 150 (1980). The record in this case reflects that MUW has a historic position in the State's educational system dating back to 1884. More than 2,000 women presently evidence their preference for MUW by having enrolled there. The choice is one that discriminates invidiously against no one.[12] And the State's purpose in preserving that choice is legitimate and substantial. Generations of our finest minds, both among educators and students, have believed that single-sex, college-level institutions afford distinctive benefits. There are many persons, of course, who have different views. But simply because there are these differences is no reason—certainly none of constitutional dimension—to conclude that no substantial state interest is served when such a choice is made available.

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[10] The Court says that "any gender-based classification provides one class a benefit or choice not available to the other class . . . ." *Ante*, at 13, n. 17. It then states that the issue "is not whether the benefitted class profits from the classification, but whether the state's decision to confer a benefit *only* upon *one* class by means of a discriminatory classification is substantially related to achieving a legitimate and substantial goal." *Ibid.* (emphasis added). This is *not* the issue in this case. Hogan is not complaining about any benefit conferred upon women. Nor is he claiming discrimination because Mississippi offers no all-male college. As his brief states, at p. 24: "Joe Hogan does not ask to attend an all-male college which offers a Bachelor of Science in nursing; he asks only to attend MUW." And he asks this only for his personal convenience.

[11] Students in respondent's position, in "being denied the right to attend the State college in their home town, are treated no differently than are other students who reside in communities many miles distant from any State supported college or university. The location of any such institution must necessarily inure to the benefit of some and and to the detriment of others, depending upon the distance the affected individuals reside from the institution." *Heaton* v. *Bristol*, 317 S.W. 2d 86, 99 (Tex. Civ. App. 1958), *cert. denied*, 359 U. S. 230 (1959), quoted in *Williams* v. *McNair*, 316 F. Supp. 134, 137 (DSC 1970), *aff'd mem.*, 401 U. S. 951 (1971).

In arguing to the contrary, the Court suggests that the MUW is so operated as to "perpetuate the stereotyped view of nursing as an exclusively women's job." *Ante*, at 11. But as the Court itself acknowledges, *id.*, at 2, MUW's School of Nursing was not created until 1971—about 90 years after the single-sex campus itself was founded. This hardly supports a link between nursing as a woman's profession and MUW's single-sex admission policy. Indeed, MUW's School of Nursing was not instituted until more than a decade *after* a separate School of Nursing was established at the coeducational University of Mississippi at Jackson. See University of Mississippi, 1982 Undergraduate Catalog 162. The School of Nursing makes up only one part—a relatively small part[13]—of MUW's diverse modern university campus and curriculum. The other departments on the MUW campus

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[12] "Such a plan (i. e., giving the student a choice of a 'single-sex' and coeducational institutions) exalts neither sex at the expense of the other, but to the contrary recognizes the equal rights of both sexes to the benefit of the best, most varied system of higher education that the State can supply." *Williams* v. *McNair*, 316 F. Supp. 134, 138 n. 15 (DSC 1970), *aff'd mem.*, 401 U. S. 951 (1971), quoting *Heaton* v. *Bristol*, 317 S.W. 2d 86, 100 (Tex. Civ. App. 1958), *cert. denied*, 359 U. S. 230 (1959).

[13] For instance, the School of Nursing takes up 15 pages of MUW's 234 page course catalog. See Mississippi University for Women, 81/82 Bulletin 185–200.

offer a typical range of degrees[14] and a typical range of subjects.[15] There is no indication that women suffer fewer opportunities at other Mississippi state campuses because of MUW's admission policy.[16]

In sum, the practice of voluntarily chosen single-sex education is an honored tradition in our country, even if it now rarely exists in state colleges and universities. Mississippi's accommodation of such student choices is legitimate because it is completely consensual and is important because it permits students to decide for themselves the type of college education they think will benefit them most. Finally, Mississippi's policy is substantially related to its long-respected objective.[17]

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[14] *E. g.*, Bachelor of Arts; Bachelor of Science; Master of Arts; Master of Science. See Mississippi University for Women, 81/82 Bulletin 40. MUW also offers special pre-professional programs in law, dentistry, medicine, pharmacy, physical therapy, and veterinary medicine. *Ibid.*

[15] MUW's Bulletin on its Table of Content lists the following subjects (offered in its School of Arts and Sciences): Air Force ROTC; Art; Behavioral Sciences; Biological Sciences; Business and Economics; Cooperative Education; English and Foreign Languages; Health, Physical Education, Recreation, and Dance; History, Journalism and Broadcasting; Mathematics; Music; Physical Sciences; and Speech Communication. See Mississippi University for Women, 81/82 Bulletin 3.

[16] For instance, the catalog for the coeducational University of Mississippi lists in its general description the "Sarah Isom Center for Women's Studies," which is described as "dedicated to the development of curriculum and scholarship about women, the dissemination of information about their expanding career opportunities, and the establishment of mutual support networks for women of all ages and backgrounds." University of Mississippi, 1982 Undergraduate Catalog 13–14. This listing precedes information about the University's Law and Medical Centers. *Id.*, at 14–15.

[17] The Court argues that MUW's means are not sufficiently related to its goal because it has allowed men to audit classes. The extent of record information is that men have audited 138 courses in the last 10 years. Brief for Respondent 21. On average, then, men have audited 14 courses a year. MUW's current annual catalog lists 913 courses offered in *one* year. See Mississippi University for Women, 81/82 Bulletin *passim*.

IV

A distinctive feature of America's tradition has been respect for diversity. This has been characteristic of the peoples from numerous lands who have built our country. It is the essence of our democratic system. At stake in this case as I see it is the preservation of a small aspect of this diversity. But that aspect is by no means insignificant, given our heritage of available choice between single-sex and coeducational institutions of higher learning. The Court answers that there is discrimination—not just that which may be tolerable, as for example between those candidates for admission able to contribute most to an educational institution and those able to contribute less—but discrimination of constitutional dimension. But, having found "discrimination," the Court finds it difficult to identify the victims. It hardly can claim that women are discriminated against. A constitutional case is held to exist solely because one man found it inconvenient to travel to any of the other institutions made available to him by the State of Mississippi. In essence he insists that he has a right to attend a college in his home community. This simply is not a sex discrimination case. The Equal Protection Clause was never intended to be applied to this kind of case.[18]

It is understandable that MUW might believe that it could allow men to audit courses without materially affecting its environment. MUW charges tuition but gives no academic credit for auditing. The University evidently is correct in believing that few men will choose to audit under such circumstances. This deviation from a perfect relationship between means and ends is insubstantial.

[18] The Court, in the opening and closing sentences and note 7 of its opinion, states the issue in terms only of a "professional nursing school" and "decline[s] to address the question of whether MUW's admissions policy, as applied to males seeking admission to schools other than the School of Nursing, violates the Fourteenth Amendment." This would be a welcome limitation if, in fact, it leaves MUW free to remain an all-women's university in each of its other schools and departments—which include four

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schools and more than a dozen departments. Cf. nn. 13–15, *supra*. The question the Court does not answer is whether MUW may remain a women's university in every respect except its School of Nursing. This is a critical question for this university and its responsible board and officials. The Court holds today that they have deprived Hogan of constitutional rights because MUW is adjudged guilty of sex discrimination. The logic of the Court's entire opinion, apart from its statements mentioned above, appears to apply sweepingly to the entire university. The exclusion of men from the School of Nursing is repeatedly characterized as "gender-based discrimination," subject to the same standard of analysis applied in previous sex discrimination cases of this Court. Nor does the opinion anywhere deny that this analysis applies to the entire university.

The Court nevertheless purports to decide this case "narrow[ly]." Normally and properly we decide only the question presented. It seems to me that in fact the issue properly before us is the single-sex policy of the University, and it is this issue that I have addressed in this dissent. The Court of Appeals so viewed this case, and unambiguously held that a single-sex state institution of higher education no longer is permitted by the Constitution. I see no principled way—in light of the Court's rationale—to reach a different result with respect to other MUW schools and departments. But given the Court's insistence that its decision applies only to the School of Nursing, it is my view that the Board and officials of MUW may continue to operate the remainder of the University on a single-sex basis without fear of personal liability. The standard of such liability is whether the conduct of the official "violate[s] clearly established statutory or constitutional rights of which a reasonable person would have known". *Harlow* v. *Fitzgerald*, —— U. S. ——, —— (1982). The Court today leaves in doubt the reach of its decision.

All issues available have
been filmed.
Unfortunately, any
scattered missing issues
are no longer available.

READEX
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981/81-411

(Slip Opinion)

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Lumber Co.*, 200 U. S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

JACKSON TRANSIT AUTHORITY ET AL. *v.* LOCAL DIVISION 1285 AMALGAMATED TRANSIT UNION, AFL-CIO-CLC

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 81-411. Argued April 21, 1982—Decided June 7, 1982

Section 13(c) of the Urban Mass Transportation Act of 1964 requires a state or local government to make arrangements to preserve transit workers' existing collective-bargaining rights before that government may receive federal financial assistance for the acquisition of a privately owned transit company. Petitioner city entered into a "§ 13(c) agreement" with respondent transit union in order to obtain federal funds to acquire a failing private bus company and convert it into petitioner Jackson Transit Authority. Thereafter, the Authority's unionized workers were covered by a series of collective-bargaining agreements. In 1975, however, the Authority notified the union that it no longer considered itself bound by the newest of the collective-bargaining agreements. The union subsequently filed suit in Federal District Court, seeking damages and injunctive relief and alleging that petitioners had breached the § 13(c) and collective-bargaining agreements. The District Court held that it lacked subject-matter jurisdiction because the complaint rested on contract rights that should be enforced only in a state court. The Court of Appeals reversed, holding that there was subject-matter jurisdiction because the claim arose under a federal law, specifically § 13(c), and that § 13(c) implicitly provided a federal private right of action.

Held: Section 13(c) does not provide the union with federal causes of action for alleged breaches of the § 13(c) and collective-bargaining agreements. While § 13(c)'s language supplies no definitive answer, the legislative history is conclusive that Congress intended that such agreements be governed by state law applied in state courts. Congress designed § 13(c) as a means to accommodate state law to collective bargaining, not as a

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Syllabus

means to substitute a federal law of collective bargaining for state labor law. Pp. 5–14.

650 F. 2d 1379, reversed and remanded.

Blackmun, J., delivered the opinion for a unanimous Court. Powell, J., filed a concurring opinion, in which O'Connor, J., joined.

NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D.C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

SUPREME COURT OF THE UNITED STATES

No. 81-411

JACKSON TRANSIT AUTHORITY, ET AL., PETITIONERS *v.* LOCAL DIVISION 1285, AMALGAMATED TRANSIT UNION, AFL-CIO-CLC

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

[June 7, 1982]

JUSTICE BLACKMUN delivered the opinion of the Court.

Under § 13(c) of the Urban Mass Transportation Act of 1964 (Act or UMTA), 78 Stat. 307, as amended, 49 U. S. C. § 1609(c),[1] a state or local government must make arrangements to preserve transit workers' existing collective bargaining rights before that government may receive federal financial assistance for the acquisition of a privately-owned transit company. This case presents the issue whether § 13(c) by itself permits a union to sue in federal court for alleged violations of an arrangement of this kind or of the collective bargaining agreement between the union and the local government transit authority.

I

A

When the Act was under consideration in the Congress, that body was aware of the increasingly precarious financial condition of a number of private transportation companies across the country, and it feared that communities might be left without adequate mass transportation. See S. Rep. No. 82, 88th Cong., 1st Sess., 4–5, 19–20 (1963). The Act was designed in part to provide federal aid for local governments in acquiring failing private transit companies, so that communities could continue to receive the benefits of mass transportation despite the collapse of the private operations. See §§ 2(b) and 3, as amended, 49 U. S. C. §§ 1601(b) and 1602.

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[1] Originally, § 13(c) was § 10(c). In 1966, the Act was amended, and the section received its present designation. Pub. L. 89-562, § 2(b)(1), 80 Stat. 716. Throughout this opinion, it is referred to as § 13(c).

At the same time, however, Congress was aware that public ownership might threaten existing collective bargaining rights of unionized transit workers employed by private companies. If, for example, state law forbade collective bargaining by state and local government employees, the workers might lose their collective bargaining rights when a private company was acquired by a local government. See Urban Mass Transportation—1963, Hearings on S.6 and S.917 before a Subcommittee of the Senate Committee on Banking and Currency, 88th Cong., 1st Sess., 318–323 (1963) (Senate Hearings) (statement of Andrew J. Biemiller, Director, Department of Legislation, AFL-CIO). To prevent federal funds from being used to destroy the collective bargaining rights of organized workers, Congress included § 13(c) in the Act. See H.R. Rep. No. 204, 88th Cong., 1st Sess., 15–16 (1963).

Section 13(c) requires, as a condition of federal assistance under the Act, that the Secretary of Labor certify that "fair and equitable arrangements" have been made "to protect the interests of employees affected by [the] assistance." The statute lists several protective steps that must be taken before a local government may receive federal aid; among these are the preservation of benefits under existing collective bargaining agreements and the continuation of collective bargaining rights. The protective arrangements must be specified in the contract granting federal aid.[2]

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[2] Section 13(c) reads in full:

"It shall be a condition of any assistance under section 3 of this title that fair and equitable arrangements are made, as determined by the Secretary

B

In 1966, petitioner city of Jackson, Tenn., applied for federal aid to convert a failing private bus company into a public entity, petitioner Jackson Transit Authority. See App. 12–16. In order to satisfy § 13(c), the Authority so created entered into a "§ 13(c) agreement" with respondent Local Division 1285, Amalgamated Transit Union, AFL-CIO-CLC, the union that represented the private company's employees. See 29 CFR pt. 215 (1981). Among other things, the § 13(c) agreement guaranteed the preservation of the transit workers' collective bargaining rights. App. 16–20. The Secretary of Labor certified that the agreement was "fair and equitable." Its substance was made a part of the grant contract between the city and the United States, and the city received approximately $279,000 in federal aid.

Thereafter, until 1975, the Authority's unionized workers were covered by a series of collective bargaining agreements. Six months after a new three-year collective bargaining agreement was signed in 1975, see *id.*, at 31, however, the Authority notified the union that it no longer considered itself bound by that contract. See *id.*, at 45.[3]

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of Labor, to protect the interests of employees affected by such assistance. Such protective arrangements shall include, without being limited to, such provisions as may be necessary for (1) the preservation of rights, privileges, and benefits (including continuation of pension rights and benefits) under existing collective bargaining agreements or otherwise; (2) the continuation of collective bargaining rights; (3) the protection of individual employees against a worsening of their positions with respect to their employment; (4) assurances of employment to employees of acquired mass transportation systems and priority of reemployment of employees terminated or laid off; and (5) paid training or retraining programs. Such arrangements shall include provisions protecting individual employees against a worsening of their positions with respect to their employment which shall in no event provide benefits less than those established pursuant to section 5(2)(f) of the Act of February 4, 1887 (24 Stat. 379), as amended. The contract for the granting of any such assistance shall specify the terms and conditions of the protective arrangements."

[3] According to the union's complaint, the Authority since 1966 had con-

Ultimately, the union filed suit in the United States District Court for the Western District of Tennessee. It sought damages and injunctive relief, alleging that petitioners had breached the § 13(c) agreement and the collective bargaining contract. App. 8, 10–11.[4] The District Court concluded that it lacked subject matter jurisdiction to hear the suit because the complaint rested on contract rights that should be enforced only in a state court. 447 F. Supp. 88 (1977).

The United States Court of Appeals for the Sixth Circuit reversed. 650 F. 2d 1379 (1981). Relying on *Bell* v. *Hood*, 327 U. S. 678 (1946), that court first determined that it had subject matter jurisdiction under 28 U. S. C. § 1331, because the union's claim arose under the laws of the United States, specifically § 13(c). The court then held that § 13(c) implicitly provides a federal private right of action. Section 13(c) reflects national labor policy, the Court of Appeals reasoned, and the rights protected by the statute are thus federal rights. The court concluded that it was consistent with the congressional intent behind § 13(c) to permit enforcement of these federal rights in federal court.

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tracted with a private individual, T. O. Petty, for the management of the transportation system. App. 6–7. The union negotiated its 1975 contract with Petty; when he left as manager of the system, the Authority claimed it was not bound by the contract he had negotiated. *Id.*, at 47. The union alleged that petitioners had promised in the § 13(c) agreement to be bound by the contracts Petty had signed and that petitioners violated both the § 13(c) agreement and the 1975 collective bargaining contract. App. 7–8.

[4] Prior to filing suit, the union asked the Secretary of Labor and the Secretary of Transportation to find that petitioners had violated the § 13(c) agreement and to ensure that petitioners complied with the agreement. Both Secretaries refused. See 650 F. 2d 1379, 1381 (CA6 1981).

In addition to relief directed at petitioners, the union requested that the two Secretaries be ordered to take appropriate enforcement action against petitioners to compel compliance with the § 13(c) agreement. App. 11. Both the District Court and the Court of Appeals refused the union's request. See 447 F. Supp. 88, 90–92 (1977); 650 F. 2d, at 1387–1388. The union has not sought review of this ruling, and we express no opinion on that aspect of the litigation.

Because of the importance of the interpretation of § 13(c) for local transit labor relations,[5] we granted certiorari. 454 U. S. 1079 (1981).

II

While the Court of Appeals treated this as a private right of action case, see, *e. g.*, *Merrill Lynch, Pierce, Fenner & Smith, Inc.* v. *Curran*, —— U. S. —— (1982), it does not fit comfortably in that mold. Indeed, since § 13(c) contemplates protective arrangements between grant recipients and unions as well as subsequent collective bargaining agreements between those parties, see H.R. Rep. No. 204, 88th Cong., 1st Sess., 16 (1963), it is reasonable to conclude that Congress expected the § 13(c) agreement and the collective bargaining agreement, like ordinary contracts, to be enforceable by private suit upon a breach. See *Transamerica Mortgage Advisors, Inc.* v. *Lewis*, 444 U. S. 11, 18–19 (1979). The gist of the union's position is not that § 13(c) creates an implied right of action to sue for violations of the statute. Instead, the union argues that "[i]t was the intent of Congress that federal law would determine the binding effect of labor protective agreements under § 13(c) and of the collective bargaining agreements reached pursuant to § 13(c) between unions and recipients of UMTA funds" so that those agreements "are enforceable in the federal courts." Brief for Respondent 24.

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[5] Several Courts of Appeals, in addition to the Sixth Circuit, have decided that § 13(c) authorizes federal suits for violations of § 13(c) agreements and collective bargaining contracts between recipients of UMTA funds and transit unions. *Division 587, Amalgamated Transit Union, AFL-CIO* v. *Municipality of Metropolitan Seattle*, 663 F. 2d 875 (CA9 1981); *Local Div. 714, Amalgamated Transit Union, AFL-CIO* v. *Greater Portland Transit District*, 589 F. 2d 1 (CA1 1978); *Local Div. 519, Amalgamated Transit Union, AFL-CIO* v. *LaCrosse Municipal Transit Utility*, 585 F. 2d 1340 (CA7 1978); *Division 1287, Amalgamated Transit Union, AFL-CIO* v. *Kansas City Area Transportation Authority*, 582 F. 2d 444 (CA8 1978), cert. denied, 439 U. S. 1090 (1979). One Court of Appeals has reached the opposite conclusion. *Local Div. 732, Amalgamated Transit Union* v. *Metropolitan Atlanta Rapid Transit Authority*, 667 F. 2d 1327 (CA11 1982). In a related decision, the First Circuit has concluded that the terms of § 13(c) agreements do not override conflicting provisions of state law. *Local Div. 589, Amalgamated Transit Union, AFL-CIO* v. *Massachusetts*, 666 F. 2d 618 (1981), cert. pending, No. 81–1817.

The issue, then, is not whether Congress intended the union to be able to bring contract actions for breaches of the two contracts, but whether Congress intended such contract actions to set forth federal, rather than state, claims. Admittedly, since the private right of action decisions address the related question whether Congress intended that a particular party be able to bring suit under a federal statute, those decisions may provide assistance in resolving this case. But the precise question before us is whether the union's contract actions are federal causes of action, not whether the union can bring suit at all to enforce its contracts. See *Local Div. 732, Amalgamated Transit Union* v. *Metropolitan Atlanta Rapid Transit Authority*, 667 F. 2d 1327, 1329–1334 (CA11 1982).[6]

As the union points out, on several occasions the Court has determined that a plaintiff stated a federal claim when he sued to vindicate contractual rights set forth by federal statutes, despite the fact that the relevant statutes lacked express provisions creating federal causes of action. In *Machinists* v. *Central Airlines, Inc.*, 372 U. S. 682 (1963), the Court held that a union had a federal cause of action to enforce an award of an airline adjustment board included in a collective bargaining contract pursuant to § 204 of the Railway Labor Act, 45 U. S. C. § 184 (1958). Similarly, in *Norfolk & Western R. Co.* v. *Nemitz*, 404 U. S. 37 (1971), the Court ruled that a railroad's employees made out federal claims when they sought to enforce assurances made by the railroad to secure the Interstate Commerce Commission's approval of a consolidation under a provision of the Interstate Commerce Act, 49 U. S. C. § 5(2)(f) (1970). And recently, in an analogous private right of action decision, the Court permitted a federal suit for rescission of a contract declared void by § 215 of the Investment Advisers Act of 1940, 15 U. S. C. § 80b-15 (1976), although the statute itself made no express provision for private suits. *Transamerica Mortgage Advisors, Inc.* v. *Lewis*, 444 U. S., at 18–19. See also *Mills* v. *Electric Auto-Lite Co.*, 396 U. S. 375, 388 (1970) (recognizing federal right to rescind contracts rendered void by § 29(b) of the Securities Exchange Act of 1934, 15 U. S. C. § 78cc(b)); *American Surety Co.* v. *Shulz*, 237 U. S. 159 (1915) (finding federal question jurisdiction to hear suit on supersedeas bond required by Rev. Stat. § 1007).

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[6] Thus, we agree with the Court of Appeals that, strictly speaking, the District Court had jurisdiction under 28 U. S. C. § 1331 to hear the union's suit. Under *Bell* v. *Hood*, 327 U. S. 678, 681 (1946), jurisdiction exists if the complaint is "drawn so as to claim a right to recover under the Constitution and laws of the United States." The complaint alleged a violation of the § 13(c) agreement required by the UMTA and of the subsequent collective bargaining agreement contemplated by the Act, and prayed for relief under federal law. We do not consider the union's asserted federal claims to be "wholly insubstantial and frivolous," 327 U. S., at 682–683, so that the District Court lacked jurisdiction to entertain the union's suit. Thus, the District Court had jurisdiction for the purposes of determining whether the union stated a cause of action on which relief could be granted. *Id.*, at 682. See also *Wheeldin* v. *Wheeler*, 373 U. S. 647 (1963).

These decisions demonstrate that suits to enforce contracts contemplated by federal statutes may set forth federal claims and that private parties in appropriate cases may sue in federal court to enforce contractual rights created by federal statutes. But they do not dictate the result in this case. Whenever we determine the scope of rights and remedies under a federal statute, the critical factor is the congressional intent behind the particular provision at issue. See, *e. g.*, *Transamerica Mortgage Advisors, Inc.* v. *Lewis*, 444 U. S., at 18; *Cannon* v. *University of Chicago*, 441 U. S. 677, 688 (1979); *Machinists* v. *Central Airlines, Inc.*, 372 U. S., at 685–692; see also n. 9, *infra*. Thus, if Congress intended that § 13(c) agreements and collective bargaining agreements be "creations of federal law," *Machinists* v. *Central Airlines, Inc.*, 372 U. S., at 692, and that the rights and duties contained in those contracts be federal in nature, see *id.*, at 695, then the union's suit states federal claims. Otherwise, the union's complaint presents only state law claims. See *Miree* v. *DeKalb County*, 433 U. S. 25 (1977).

III

We begin with the language of the statute itself. See, *e. g.*, *Universities Research Assn.* v. *Coutu*, 450 U. S. 754, 771 (1981). The bare language of § 13 (c) is not conclusive. In some ways, the statute seems to make § 13(c) agreements and collective bargaining contracts creatures of federal law. Section 13(c) demands "fair and equitable arrangements" as prerequisites for federal aid; it requires the approval of the Secretary of Labor for those arrangements; it specifies five different varieties of protective provisions that must be included among the § 13(c) arrangements; and it expressly incorporates the protective arrangements into the grant contract between the recipient and the Federal Government.[7] See n. 2, *supra*. On the other hand, labor relations between local governments and their employees are the subject of a longstanding statutory exemption from the National Labor Relations Act. 29 U. S. C. § 152(2). Section 13(c) evinces no congressional intent to upset the decision in the National Labor Relations Act to permit state law to govern the relationships between local governmental entities and the unions representing their employees. See *Cort* v. *Ash*, 422 U. S. 66, 78 (1975) (noting reluctance to permit suit in federal court when "the cause of action [is] one traditionally relegated to state law").

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[7] The statute also provides that the protective "arrangements shall include provisions . . . which shall in no event provide benefits less than those established pursuant to section 5(2)(f). . . ." As we explain, see n. 9, *infra*, this portion of the statute strengthens the union's position, but we do not consider it at all determinative.

While the statutory language supplies no definitive answer, the legislative history is conclusive. A consistent theme runs throughout the consideration of § 13(c): Congress intended that labor relations between transit workers and local governments would be controlled by state law.

In 1963, Secretary of Labor Wirtz presented the original version of § 13(c) to the relevant House and Senate Committees. Before both committees, Members of Congress expressed concern about the effect of the statute on state laws. And Secretary Wirtz explained to both committees that, while attempts would be made to accommodate state law to the preservation of collective bargaining rights, state law would control local transit labor relations. The Secretary told the House Committee that "this proposal is submitted on this basis, . . . that the State laws must control." Urban Mass Transportation Act of 1963, Hearings on H.R. 3881 before the House Committee on Banking and Currency, 88th Cong., 1st Sess., 482 (1963) (House Hearings). A committee member raised the issue again; the Secretary repeated that "State laws would be controlling in the situation," though he suggested that there "would be few, if any, situations" where state law and § 13(c) could not be reconciled. House Hearings, at 486. When similar concerns were expressed during his testimony before the Senate Committee, the Secretary reiterated: "I should like it quite clear that I think that there could be no superseding here of the State law." Senate Hearings, at 313.

The House and Senate Reports took the Secretary at his word. The House Report advised that § 13(c) would ensure protection of the interests of workers, but that "subject to the basic standards set forth in the bill, specific conditions for worker protection will normally be the product of local bargaining and negotiation." H.R. Rep. No. 204, 88th Cong., 1st Sess., 16 (1963). The Senate Report was more direct:

"In regard to the question as to whether these provisions would supersede State labor laws, the committee concurs in a statement made by the Secretary of Labor 'that there could be no superseding of State laws by a provision of this kind.'" S. Rep. No. 82, 88th Cong., 1st Sess., 29 (1963).

During the debates, the role of state law under § 13(c) was discussed at length. Senators Goldwater and Tower suggested that § 13(c) would supplant state law with federal law. 109 Cong. Rec. 5416 (1963). Senator Williams, one of the bill's chief sponsors, replied: "The legislative history has to be corrected" because "we must have a record that will show that the bill does not preempt State law; it does not control or dominate with irrevocable authority local situations." *Id.*, at 5417. The proposed statute, Senator Williams continued, would not "preempt or be a substitute for State law." *Ibid.* Senator Goldwater remained adamant that "we are attempting a major alteration in the Nation's labor laws." *Id.*, at 5418. But Senator Sparkman, the Chairman of the Senate Committee, repeated the Secretary's assurance that § 13(c) "will not supersede or displace or override" state law. 109 Cong. Rec. 5418 (1963).[8]

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[8] The union points to the fact that Congress rejected amendments that would have required the continuation of collective bargaining rights only to the extent not inconsistent with state law. See 109 Cong. Rec. 5422 (1963); *id.*, at 5582; *id.*, at 5684; 110 Cong. Rec. 14980 (1964). But, as Senator Williams explained, those amendments were rejected not because Congress thought § 13(c) would supplant state labor law but because such an amendment was "clearly . . . unnecessary" to guarantee that § 13(c) would not "supersede or preempt or override State law." 109 Cong. Rec. 5421 (1963). Accord: 110 Cong. Rec. 14980 (1964) (remarks of Congressmen Multer and Rains).

Beyond the explanation given by Senator Williams and repeated on the House floor, the defeat of these amendments merely reflected a congressional intent that the Federal Government be able to seek changes in state law and ultimately to refuse financial assistance when state law prevented compliance with § 13(c). See 109 Cong. Rec. 5684 (1963) (remarks of Senator Morse); *id.*, at 5422 (remarks of Senator Javits).

The Senate returned to the issue during a colloquy between Senator Goldwater and Senator Morse. Senator Goldwater feared that the proposed statute would override state laws denying public employees the right to strike. *Id.*, at 5673. Senator Morse assured Senator Goldwater otherwise, that "the State law would supervene." *Ibid.* When Senator Goldwater inquired about state laws other than those concerning the right to strike, Senator Morse replied in the same vein: "The amendment does not supersede any State policy." *Ibid.*

In an important exchange, Senator Goldwater noted that local government employers were excluded from the coverage of the National Labor Relations Act, see 29 U. S. C. § 152(2), and asked whether § 13(c) would be inconsistent with that exclusion. 109 Cong. Rec. 5673–5674 (1963). Senator Morse responded that the language of the bill "make[s] it clear that the Taft-Hartley exemptions are not changed by the amendment." *Id.*, at 5674. See also *id.*, at 5422 (remarks of Senator Javits) (state law could not be overriden "under any phase of the Taft-Hartley law"). Senator Morse underscored the purpose of the amendment: "I cannot emphasize the point more than I already have done in the legislative history in our debate. It deals with municipal and State problems, and not Federal problems." *Id.*, at 5674. Finally, Senator Goldwater asked whether state law would control if there were no specific state law forbidding strikes by public employees. Senator Morse adhered to the same course: "In the absence of any local law, it would be for the State court to decide whether [the employees] had that right." *Ibid.*

A similar, but more abbreviated, interchange took place on the House floor. When some Congressmen questioned the effect of § 13(c) on state law, they were reassured by Congressman Multer that "[n]othing in this bill . . . will infringe upon local law, whether it be of a State or municipality." 110 Cong. Rec. 14980 (1964). And Congressman Rains repeated, "there is not one line in this bill that would vitiate in any way any State or local law." *Ibid.*

Thus, Congress made it absolutely clear that it did not intend to create a body of federal law applicable to labor relations between local governmental entities and transit workers.[9] Section 13(c) would not supersede state law, it would leave intact the exclusion of local government employers from the National Labor Relations Act, and state courts would retain jurisdiction to determine the application of state policy to local government transit labor relations. Congress intended that § 13(c) would be an important tool to protect the collective bargaining rights of transit workers, by ensuring that state law preserved their rights before federal aid could be used to convert private companies into public entities.[10] See 109 Cong. Rec. 5673 (1963) (remarks of Senator Morse) (if city proposed to reject collective bargaining, it would be ineligible for federal aid). But Congress designed § 13(c) as a means to accommodate state law to collective bargaining, not as a means to substitute a federal law of collective bargaining for state labor law.[11]

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[9] In light of the legislative history of § 13(c), we do not find *Transamerica Mortgage Advisors, Inc.* v. *Lewis*, 444 U. S. 11 (1979), or *Machinists* v. *Central Airlines, Inc.*, 372 U. S. 682 (1963), to be controlling. Both cases turned on the language, purpose, and legislative history of the particular statute involved, see *Transamerica*, 444 U. S., at 18–19; *Machinists*, 372 U. S., at 685–695, and we read the congressional intent behind § 13(c) to be far different from the congressional purpose underlying the statutes at issue in those cases.

Norfolk & Western R. Co. v. *Nemitz*, 404 U. S. 37 (1971), of course, is not to be overlooked. In that case, the Court decided that a railroad's employees stated federal claims when they alleged a breach of an agreement entered into by the railroad under § 5(2)(f) of the Interstate Commerce Act, 49 U. S. C. § 5(2)(f)(1970). Section 13(c) refers to § 5(2)(f) and provides that the protective arrangements shall not provide benefits less than those established by § 5(2)(f). See nn. 2 and 7, *supra*. If, when it passed § 13(c), Congress had expressed an awareness that § 5(2)(f) assurances could be enforced in federal court, or if there was reason to presume such awareness, the reference in § 13(c) to § 5(2)(f) would make this a different case. See generally *Merrill Lynch, Pierce, Fenner & Smith, Inc.* v. *Curran*, —— U. S. —— (1982). But the legislative history contains no such congressional recognition. Furthermore, *Nemitz* was decided several years after § 13(c) was enacted. Consequently, we find the specific legislative history of § 13(c), not the holding of *Nemitz*, to be determinative.

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[10] The union relies upon the fact that Congress strengthened the language of § 13(c) during the course of its passage. Congress wrote § 13(c) to require protective provisions "necessary for" the protection of collective bargaining rights, rather than provisions "as are found to be appropriate for" the protection of those rights, as the Kennedy Administration had recommended. See House Hearings, at 476; 110 Cong. Rec. 14976 (1964). In addition, § 13(c)(2) was amended at the request of Senator Morse to require the "continuation" of collective bargaining rights rather than the mere "encouragement" of the continuation of those rights. See 109 Cong. Rec. 5627 (1963); *id.*, at 5685. But these alterations in the bill demonstrate only that Congress demanded that the Secretary ensure that state law preserved collective bargaining rights before he provided federal aid for acquisition of a private transit company. When viewed in conjunction with the discussion of state law in the legislative history, the modifications of the original bill do not prove that Congress intended that federal rather than state law would govern a contract between a UMTA aid recipient and a union representing its employees.

[11] Senator Javits summarized:

"[W]e have a balanced scheme. We do not override the [state] law; at the same time, we do not compel the Federal Government to go in where the law is adverse to the interest of labor and labor's own point of view, and perhaps also even give encouragement to exempt a situation of this kind where the State desires to get this type of Federal help." 109 Cong. Rec. 5422 (1963).

There remains the possibility that Congress might have intended a federal court to hear the union's claims, but to apply state law. Such an anomalous result would be inconsistent with the emphasis in the legislative history that § 13(c) addresses "municipal and State problems, and not Federal problems," *id.*, at 5674. Thus, unless there is an independent source of jurisdiction, such as diversity or pendent jurisdiction, the union must sue in state court. See *Transamerica Mortgage Advisors, Inc.* v. *Lewis*, 444 U. S., at 19, n. 8; *Shoshone Mining Co.* v. *Rutter*, 177 U. S.

IV

Given this explicit legislative history, we cannot read § 13(c) to create federal causes of action for breaches of § 13(c) agreements and collective bargaining contracts between UMTA aid recipients and transit unions.[12] The legislative history indicates that Congress intended those contracts to be governed by state law applied in state courts.[13]

Accordingly, the judgment of the Court of Appeals is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

505, 506–507 (1900).

[12] Based on the legislative history, we could not permit the union to bring a federal suit if we characterized its complaint as alleging that petitioners violated § 13(c) itself by virtue of the alleged contractual breaches. See Brief for Respondent 33-34.

Nor does 42 U. S. C. § 1983 permit the union to bring suit. As the Court held in *Maine* v. *Thiboutot*, 448 U. S. 1 (1980), § 1983 encompasses deprivations of rights secured by all "laws" of the United States, of which § 13(c) is, of course, one. But because we have determined that Congress did not intend that breaches of § 13(c) agreements or collective bargaining contracts would constitute deprivations of federal rights secured by § 13(c), the union has no cause of action under § 1983. See *Middlesex County Sewerage Authority* v. *National Sea Clammers Assn.*, 453 U. S. 1, 19–21 (1981).

[13] There are other possible remedies for violations of § 13(c) agreements and collective bargaining contracts. The union, of course, can pursue a contract action in state court. In addition, the Federal Government can respond by threatening to withhold additional financial assistance. See *Local Div. 589*, 666 F. 2d, at 634–635.

While we hold that the union cannot sue in federal court to enforce its contracts, we express no view on the entirely separate question whether the Federal Government could bring a federal suit against a UMTA funding recipient for violating the terms of its grant agreement with the Government. Such a suit would involve a different contract from the § 13(c) agreement and the collective bargaining agreement at issue in this case. See generally *Local Div. 732*, 667 F. 2d, at 1338–1339; *Local Div. No. 714*, 589 F. 2d, at 13.

SUPREME COURT OF THE UNITED STATES

No. 81-411

JACKSON TRANSIT AUTHORITY, ET AL., PETITIONERS *v.* LOCAL DIVISION 1285, AMALGAMATED TRANSIT UNION, AFL–CIO–CLC

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

[June 7, 1982]

JUSTICE POWELL, with whom JUSTICE O'CONNOR joins, concurring.

As the Court notes, this case "does not fit comfortably in . . . [the] mold" of our implied right of action cases. *Ante*, at 5. Congress here provided for the making of contracts that it must have intended to be enforced. The Court thus identifies the question correctly as whether Congress intended those contracts to be enforced in federal court. *Ante*, at 6. This of course is precisely the question on which implied rights of action cases properly are decided. See, *e. g.*, *Middlesex County Sewerage Auth.* v. *National Sea Clammers Assn.*, 453 U. S. 1, 13 (1981); *Texas Industries, Inc.* v. *Ratcliff Materials, Inc.*, 451 U. S. 630, 639 (1981).

There are other parallels between this case and those in the more familiar implied right of action "mold." Most significantly to me, both kinds of case involve the same fundamental issues of congressional and judicial power. By enforcing contract rights not within the jurisdictional grant conferred by Congress, as much as by improperly "inferring" a right of action, "a court of limited jurisdiction necessarily extends its authority to embrace a dispute Congress has not assigned it to resolve. . . . This runs contrary to the established principle that '[t]he jurisdiction of federal courts is carefully guarded against expansion by judicial interpretation . . . ,' *American Fire & Casualty Co.* v. *Finn*, 341 U. S.

6, 17 (1951), and conflicts with the authority of Congress under Art. III to set the limits on federal jurisdiction." *Cannon* v. *University of Chicago*, 441 U. S. 677, 746–747 (1979) (POWELL, J., dissenting).

Because a federal court should exercise extreme caution before assuming jurisdiction not clearly conferred by Congress, we should not condone the implication of federal jurisdiction over contract claims in the absence of an unambiguous expression of congressional intent. As I do not view this position as inconsistent with the reasoning of the Court, I join its opinion.

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(Slip Opinion)

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SUPREME COURT OF THE UNITED STATES

Syllabus

INSURANCE CORPORATION OF IRELAND, LTD., ET AL. v. COMPAGNIE DES BAUXITES DE GUINEE

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 81–440. Argued March 23, 1982—Decided June 1, 1982

Federal Rule of Civil Procedure 37(b)(2)(A) provides that a district court, as a sanction for failure to comply with discovery orders, may enter "[a]n order that the matters regarding which the [discovery] order was made or any other designated facts shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order." Asserting diversity jurisdiction, respondent, a Delaware corporation with its principal place of business in the Republic of Guinea, filed suit against various insurance companies in the United States District Court for the Western District of Pennsylvania to recover on a business-interruption policy. When certain of the defendants (a group of foreign insurance companies, including petitioners) raised the defense of lack of personal jurisdiction, respondent attempted to use discovery in order to establish jurisdictional facts. After petitioners repeatedly failed to comply with the court's orders for production of the requested information, the court warned them that unless they complied by a specified date, it would assume, pursuant to Rule 37(b)(2)(A), that it had personal jurisdiction. When petitioners again failed to comply, the court imposed the sanction, and the Court of Appeals affirmed, concluding that imposition of the sanction fell within the trial court's discretion under Rule 37(b)(2)(A) and that the sanction did not violate petitioners' due process rights.

Held:

1. Rule 37(b)(2)(A) may be applied to support a finding of personal jurisdiction without violating due process. Unlike subject-matter jurisdiction, which is an Art. III as well as a statutory requirement, the requirement that a court have personal jurisdiction flows from the Due Process Clause and protects an individual liberty interest. Because it

Ju 6.8/6:

protects an individual interest, it may be intentionally waived, or for various reasons a defendant may be estopped from raising the issue. Due process is violated by a rule establishing legal consequences of a failure to produce evidence only if the defendant's behavior will not support the presumption that "the refusal to produce evidence material to the administration of due process was but an admission of the want of merit in the asserted defense." *Hammond Packing Co.* v. *Arkansas*, 212 U. S. 322, 351. A proper application of Rule 37(b)(2)(A) will, as a matter of law, support such a presumption. Pp. 7–13.

2. The District Court did not abuse its discretion in applying Rule 37(b)(2)(A) in this case. The record establishes that imposition of the sanction here satisfied the Rule's requirements that the sanction be both "just" and specifically related to the particular "claim" that was at issue in the discovery order. Pp. 13–15.

651 F. 2d 877, affirmed.

WHITE, J., delivered the opinion of the Court, in which BURGER, C. J., and BRENNAN, MARSHALL, BLACKMUN, REHNQUIST, STEVENS, and O'CONNOR, JJ., joined. POWELL, J., filed an opinion concurring in the judgment.

NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D.C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

SUPREME COURT OF THE UNITED STATES

No. 81-440

INSURANCE CORP. OF IRELAND, LTD. ET AL., PETITIONERS, *v.* COMPAGNIE DES BAUXITES DE GUINEA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

[June 1, 1982]

JUSTICE WHITE delivered the opinion of the Court.

Rule 37(b), Federal Rules of Civil Procedure, provides that a District Court may impose sanctions for failure to comply with discovery orders. Included among the available sanctions is:

> "An order that the matters regarding which the order was made or any other designated facts shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order." Rule 37(b)(2)(A).

The question presented by this case is whether this rule is applicable to facts that form the basis for personal jurisdiction over a defendant. May a District Court, as a sanction for failure to comply with a discovery order directed at establishing jurisdictional facts, proceed on the basis that personal jurisdiction over the recalcitrant party has been established? Petitioners urge that such an application of the Rule would violate Due Process: If a court does not have jurisdiction over a party, then it may not create that jurisdiction by judicial fiat.[1] They contend also that until a court has jurisdiction over a party, that party need not comply with orders of the court; failure to comply, therefore, cannot provide the ground for a sanction. In our view, petitioners are attempting to create a logical conundrum out of a fairly straightforward matter.

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[1] The petition with which we deal in this case was filed as a cross-petition in response to the petition for certiorari filed in No. 81-290. We granted

I

Respondent Compagnie des Bauxites de Guinee ("CBG") is a Delaware Corporation, 49% of which is owned by the Republic of Guinea and 51% is owned by Halco (Mining) Inc. CBG's principal place of business is in the Republic of Guinea, where it operates bauxite mines and processing facilities. Halco, which operates in Pennsylvania, has contracted to perform certain administrative services for CBG. These include the procurement of insurance.

In 1973, Halco instructed an insurance broker, Marsh & McLennan, to obtain 20 million dollars worth of business interruption insurance to cover CBG's operations in Guinea. The first half of this coverage was provided by the Insurance Company of North America ("INA"). The second half, or what is referred to as the "excess" insurance, was provided by a group of twenty-one foreign insurance companies,[2] four-

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the cross-petition, limiting the grant to the question of the validity of the Rule 37(b)(2) sanction. We shall refer to the cross-petitioners as "petitioners" and to the cross-respondent as "respondent."

[2] The district court described these excess insurers as follows:

"Of the 21 Excess Insurers, 5 are English companies representing English domestic interests but insuring risks throughout the world, particularly in Pennsylvania. Seven are English companies which represent non English parents, or affiliates. The United States, Japan and Israel are the nationalities of two each of the Excess Insurer Defendants. Switzerland and the Republic of Ireland are the nationalities of one each of the Excess Insurer Defendants. The remaining Excess Insurer Defendant is a Belgium Company which represents the United States parent." 1 Joint Appendix (hereinafter J.A.) 196a.

teen of which are petitioners in this action (the "excess insurers").[3]

Marsh & McLennan requested Bland Payne to obtain the excess insurance in the London insurance market. Pursuant to normal business practice

> "[i]n late January and in February, 1974, Bland Payne presented to the exess insurer [petitioners] a placing slip in the amount of $10,000,000, in excess of the first $10,000,000. [Petitioners] initialed said placing slip, effective February 12, 1974, indicating the part of said $10,000,000 each was willing to insure."[4] Finding 27 of the District Court, 2 J.A. 347a.

Once the offering was fully subscribed, Bland Payne issued a cover note indicating the amount of the coverage and specifying the percentage of the coverage that each excess insurer had agreed to insure. No separate policy was issued; the excess insurers adopted the INA policy "as far as applicable."

Sometime after February 12, CBG allegedly experienced mechanical problems in its Guinea operation, resulting in a business interruption loss in excess of $10,000,000. Contending that the loss was covered under its policies, CBG brought suit when the insurers refused to indemnify CBG for the loss. Whatever the mechanical problems experienced by CBG, they were perhaps minor compared to the legal difficulties encountered in the courts.

In December, 1975, CBG filed a two count suit in the Western District of Pennsylvania, asserting jurisdiction based on diversity of citizenship. The first count was against INA; the second against the excess insurers. INA did not challenge personal or subject matter jurisdiction of the District

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[3] Four of the excess insurers did not contest personal jurisdiction in the district court. 1 J.A. 105a. The Court of Appeals directed the dismissal of the complaint with respect to three others. 651 F. 2d 877, 886 (1981). CBG challenges the latter action in its petition for certiorari, No. 81-290.

[4] One of the excess insurers, L'Union Atlantique S.A. d'Assurances, does business in Brussels, and was sent a separate placing slip.

Court. The answer of the excess insurers, however, raised a number of defenses, including lack of *in personam* jurisdiction. Subsequently, this alleged lack of personal jurisdiction became the basis of a motion for summary judgment filed by the excess insurers.[5] The issue in this case requires an account of respondent's attempt to use discovery in order to demonstrate the court's personal jurisdiction over the excess insurers.

Respondent's first discovery request—asking for "copies of all business interruption insurance policies issued by defendant during the period from January 1, 1972 to December 31, 1975"—was served on each defendant in August 1976. In January 1977, the excess insurers objected, on grounds of burdensomeness, to producing such policies. Several months later, respondent filed a motion to compel petitioners to produce the requested documents. In June, 1978, the court orally overruled petitioners' objections. This was followed by a second discovery request in which respondent narrowed the files it was seeking to polices which "were delivered in. . . . Pennsylvania . . . or covered a risk located in . . . Pennsylvania." Petitioners now objected that these documents were not in their custody or control; rather, they were kept by the brokers in London. The court ordered petitioners to request the information from the brokers, limiting the request to policies covering the period from 1971 to date. That was in July, 1978; petitioners were given 90 days to produce the information. On November 8, petitioners were given an additional 30 days to complete discovery. On November 24, petitioners filed an affidavit offering to make their records, allegedly some 4 million files, available at their offices in London for inspection by respondent. Respondent countered with a motion to compel production of the previously requested documents. On December 21, 1978, the court, noting that no conscientious effort had yet been made to produce the requested information and that no objection had been entered to the discovery order in July, gave petitioners 60 more days to produce the requested information. He also issued the following warning:

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[5] The Motion for Summary Judgment was filed on May 20, 1977. In it, seventeen of the excess insurers alleged a lack of *in personam* jurisdiction and all twenty-one excess insurers sought dismissal on the ground of *forum non conveniens*. The district court denied the motion on April 19, 1979.

> [I]f you don't get it to him in 60 days, I am going to enter an order saying that because you failed to give the information as requested, that I am going to assume, under rule of Civil Procedure 37 B, subsection 2(A), that there is jurisdiction." 1 J.A., at 115a

A few moments later he restated the warning as follows: "I will assume that jurisdiction is here with this court unless you produce statistics and other informtion in that regard that would indicate otherwise." 1 J.A. 116a.

On April 19, 1979, the court, after concluding that the requested material had not been produced, imposed the threatened sanction, finding that "for the purpose of this litigation the Excess Insurers are subject to the *in personam* jurisdiction of this Court because of their business contacts with Pennsylvania." 1 J.A. 201a. Independently of the sanction, the district court found two other grounds for holding that it had personal jurisdiction over petitioners. First, on the record established, it found that petitioners had sufficient business contacts with Pennsylvania to fall within the Pennsylvania Long-Arm Statute. Second, in adopting the terms of the INA contract with CBG—a Pennsylvania insurance contract—the excess insurers implicitly agreed to submit to the jurisdiction of the court.[6]

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[6] On March 22, 1979, the excess insurers instituted a suit against CBG in England, attacking the validity of insurance contract. In its April 19 decision, the district court found that "the commencement of the separate action in England [was] oppressive, unfair, and an act of bad faith under all of the circumstances." 1 J.A. 203a. It, therefore, enjoined the continuation

Except with respect to three excess insurers, the Court of Appeals for the Third Circuit affirmed the jurisdictional holding, relying entirely upon the validity of the sanction.[7] That court specifically found that the discovery orders of the district court did not constitute an abuse of discretion and that imposition of the sanction fell within the limits of trial court discretion under Rule 37(b):

> "The purpose and scope of the ordered discovery were directly related to the issue of jurisdiction and the rule 37 sanction was tailored to establish as admitted those jurisdictional facts that, because of the insurers' failure to comply with discovery orders, CBG was unable to adduce through discovery."

Furthermore, it held that the sanction did not violate petitioners' due process rights, because it was no broader than "reasonably necessary" under the circumstances.

Because the decision below directly conflicts with the decision of the Court of Appeals for the Fifth Circuit in *Familia de Boom* v. *Arosa Mercantil, S.A.*, 629 F. 2d 1134 (1980), we granted certiorari.[8]

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of that suit. This aspect of the district court decision was reversed by the Court of Appeals. Respondent seeks certiorari review of that decision. (see note 1, *supra*).

[7] It reversed as to three of the excess insurers on the grounds that they had complied with the discovery orders and that their contacts with Pennsylvania were not sufficient to justify exercise of the Pennsylvania long-arm statute. It also held that the district court had abused its discretion in enjoining the action in England. Judge Gibbons dissented on the propriety of the sanction, arguing that the district court had abused its discretion. He also expressed some doubt that a Rule 37 sanction could ever be used as the source of personal jurisdiction. 651 F. 2d, at 892, n. 4.

[8] In *Familia de Boom*, the Fifth Circuit held that a sanction under Rule 37(b)(2) is valid only if the court has personal jurisdiction over the party that has refused compliance with a court order. Personal jurisdiction must, it held, appear from the record independently of the sanction. The Courts of Appeals for the Fourth and Eighth Circuits, on the other hand,

II

In *McDonald* v. *Mabee*, 243 U. S. 90 (1917), another case involving an alleged lack of personal jurisdiction, Justice Holmes wrote for the Court, "great caution should be used not to let fiction deny the fair play that can be secured only by a pretty close adhesion to fact." *Id.*, at 91. Petitioners' basic submission is that to apply Rule 37(b)(2) to jurisdictional facts is to allow fiction to get the better of fact and that it is impermissible to use a fiction to establish judicial power, where, as a matter of fact, it does not exist. In our view, this represents a fundamental misunderstanding of the nature of personal jurisdiction.

The validity of an order of a federal court depends upon that court's having jurisdiction over both the subject matter and the parties. *Stoll* v. *Gottlieb*, 305 U. S. 165, 171–172 (1938); *Thompson* v. *Whitman*, 18 Wall 457, 465 (1873). The concepts of subject matter and personal jurisdiction, however, serve different purposes, and these different purposes affect the legal character of the two requirements. Petitioners fail to recognize the distinction between the two concepts—speaking instead in general terms of "jurisdiction"—although their argument's strength comes from conceiving of jurisdiction only as subject matter jurisdiction.

Federal courts are courts of limited jurisdiction. The character of the controversies over which federal judicial authority may extend are delineated in Article III, §2, cl. 1. Jurisdiction of the lower federal courts is further limited to those subjects encompassed within a statutory grant of jurisdiction. Again, this reflects the constitutional source of federal judicial power: Apart from this Court, that power only

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have agreed with the Third Circuit on the appropriateness of a sanction on the issue of personal jurisdiciton. *English* v. *21st Phoenix Corp*, 590 F. 2d 723 (CA8 1979); *Lekkas* v. *Liberian M/V Caledonia*, 443 F. 2d 10, 11 (CA4 1971).

exists "in such inferior Courts as the Congress may from time to time ordain and establish." Art. III, § 1.

Subject matter jurisdiction, then, is an Article III as well as a statutory requirement; it functions as a restriction on federal power, and contributes to the characterization of the federal sovereign. Certain legal consequences directly follow from this. For example, no action of the parties can confer subject matter jurisdiction upon a federal court. Thus, the consent of the parties is irrelevant, *California* v. *La Rue*, 409 U. S. 109 (1972), principles of estoppel do not apply, *American Fire & Casualty Co.* v. *Finn*, 341 U. S. 6, 17–18 (1951), and a party does not waive the requirement by failing to challenge jurisdiction early in the proceedings. Similarly, a court, including an appellate court, will raise lack of subject matter jurisdiction on its own motion. "[T]he rule, springing from the nature and limits of the judicial power of the United States is inflexible and without exception, which requires this court, of its own motion, to deny its jurisdiction, and, in the exercise of its appellate power, that of all other courts of the United States, in all cases where such jurisdiction does not affirmatively appear in the record." *Mansfield, Coldwater & Lake Michigan Ry. Co.* v. *Swan*, 111 U. S. 379, 382 (1884).[9]

None of this is true with respect to personal jurisdiction. The requirement that a court have personal jurisdiction flows not from Art. III, but from the Due Process Clause. The personal jurisdiction requirement recognizes and protects an individual liberty interest. It represents a restriction on judicial power not as a matter of sovereignty, but as a matter of individual liberty.[10] Thus, the test for personal jurisdiction requires that "the maintenance of the suit . . . not offend 'traditional notions of fair play and substantial justice.'" *International Shoe* v. *Washington*, 326 U. S. 310, 316 (1945), quoting *Milliken* v. *Meyers*, 311 U. S. 457, 463 (1940).

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[9] A party that has had an opportunity to litigate the question of subject matter jurisdiction may not, however, reopen that question in a collateral attack upon an adverse judgment. It has long been the rule that principles of *res judicata* apply to jurisdictional determinations—both subject matter and personal. See *Chicot County Drainage Dist.* v. *Bank*, 308 U. S. 371 (1940); *Stoll* v. *Gottlieb*, 305 U. S. 165 (1938).

Because the requirement of personal jurisdiction represents first of all an individual right, it can, like other such rights, be waived. In *McDonald* v. *Mabee*, *supra*, the Court indicated that regardless of the power of the state to serve process, an individual may submit to the jurisdiction of the

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[10] It is true that we have stated that the requirement of personal jurisdiction, as applied to state courts, reflects an element of federalism and the character of state sovereignty vis-a-vis other states. For example, in *World-Wide Volkswagen Corp.* v. *Woodson*, 444 U. S. 286, 291–293 (1980), we stated:

"[A] state court may exercise personal jurisdiction over a nonresident defendant only so long as there exist 'minimum contacts' between the defendant and the forum State. The concept of minimum contacts, in turn, can be seen to perform two related, but distinguishable, functions. It protects the defendant against the burdens of litigating in a distant or inconvenient forum. And it acts to ensure that the States, through their courts do not reach out beyond the limits imposed on them by their status as coequal sovereigns in a federal system." (Citations omitted.)

Contrary to the suggestion of JUSTICE POWELL, *post*, at 5–6, our holding today does not alter the requirement that there be "minimum contacts" between the nonresident defendant and the forum state. Rather, our holding deals with how the facts needed to show those "minimum contacts" can be established when a defendant fails to comply with court-ordered discovery. The restriction on state sovereign power described in *World-Wide Volkswagen Corp.*, however, must be seen as ultimately a function of the individual liberty interest preserved by the Due Process Clause. That clause is the only source of the personal jurisdiction requirement and the clause itself makes no mention of federalism concerns. Furthermore, if the federalism concept operated as an independent restriction on the sovereign power of the court, it would not be possible to waive the personal jurisdiction requirement: Individual actions cannot change the powers of sovereignty, although the individual can subject himself to powers from which he may otherwise be protected.

Court by appearance. A variety of legal arrangements have been taken to represent express or implied consent to the the personal jurisdiciton of the court. In *National Rental* v. *Szukhent*, 375 U. S. 311, 316 (1964), we stated that "parties to a contract may agree in advance to submit to the jurisdiction of a given court," and in *Petrowski* v. *Hawkeye-Security Co.*, 350 U. S. 495 (1956), the Court upheld the personal jurisdiction of a district court on the basis of a stipulation entered into by the defendant. In addition, lower federal courts have found such consent implicit in agreements to arbitrate. See *Victory Transport, Inc.* v. *Comisaria General de Abastecimientos y Transportes*, 336 F. 2d 354 (CA2 1964); 2 Moores Federal Practice § 4.02[3], n. 22 and cases listed there. Furthermore, the Court has upheld state procedures which find constructive consent to the personal jurisdiction of the state court in the voluntary use of certain state procedures. See *Adam* v. *Saenger*, 303 U. S. 59, 67–68 (1938) ("There is nothing in the Fourteenth Amendment to prevent a state from adopting a procedure by which a judgment *in personam* may be rendered in a cross-action against a plaintiff in its courts . . . It is the price which the state may exact as the condition of opening its courts to the plaintiff."); *Chicago Life Ins. Co.* v. *Cherry*, 244 U. S. 25, 29–30 (1917) ("[W]hat acts of the defendant shall be deemed a submission to [a court's] power is a matter upon which States may differ."). Finally, unlike subject matter jurisdiction, which even an appellate court may review *sua sponte*, under Rule 12(h), Fed. Rules Civ. Proc., "a defense of lack of jurisdiction over the person . . . is waived" if not timely raised in the answer or a responsive pleading.

In sum, the requirement of personal jurisdiction may be intentionally waived, or for various reasons a defendant may be estopped from raising the issue. These characteristics portray it for what it is—a legal right protecting the individual. The plaintiff's demonstration of certain historical facts may make clear to the court that it has personal jurisdiction over the defendant as a matter of law—*i. e.*, certain factual showings will have legal consequences—but this is not the only way in which the personal jurisdiction of the court may arise. The actions of the defendant may amount to a legal submission to the jurisdiction of the court, whether voluntary or not.

The expression of legal rights is often subject to certain procedural rules: The failure to follow those rules may well result in a curtailment of the rights. Thus, the failure to enter a timely objection to personal jurisdiction constitutes, under Rule 12(h)(1), a waiver of the objection. A sanction under Rule 37(b)(2)(A) consisting of a finding of personal jurisdiction has precisely the same effect. As a general proposition, the Rule 37 sanction applied to a finding of personal jurisdiction creates no more of a due process problem than the Rule 12 waiver. Although "a court cannot conclude all persons interested by its mere assertion of its own power," *Chicago Life Ins. Co.* v. *Cherry*, *supra*, at 29 , not all rules that establish legal consequences to a party's own behavior are "mere assertions" of power.

Rule 37(b)(2)(a) itself embodies the standard established in *Hammond Packing Co.* v. *Arkansas*, 212 U. S. 322 (1909), for the Due Process limits on such rules.[11] There the Court held that it did not violate due process for a state court to strike the answer and render a default judgment against a defendant who failed to comply with a pretrial discovery order. Such a rule was permissible as an expression of "the undoubted right of the lawmaking power to create a presumption of fact as to the bad faith and untruth of an answer begotten from the suppression or failure to produce the proof ordered . . . [T]he preservation of due process was secured by the presumption that the refusal to produce evidence material to the administration of due process was but an admission of the want of merit in the asserted defense." *Id.*, at 351.

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[11] The Advisory Committe notes to the Rule specifically stated that "the provisions of the rule find support in [*Hammond Packing Co.* v. *Arkansas*, 212 U. S. 322 (1909)]." See also *Societe Internationale* v. *Rogers*, 357 U. S. 197, 209 (1958).

The situation in *Hammond* was specifically distinguished from that in *Hovey* v. *Elliott*, 167 U. S. 409 (1897), in which the Court held that it did violate due process for a court to take similar action as "punishment" for failure to obey an order to pay into the registry of the court a certain sum of money. Due process is violated only if the behavior of the defendant will not support the *Hammond Packing* presumption. A proper application of Rule 37(b)(2) will, as a matter of law, support such a presumption. See *Societe Internationale* v. *Rogers*, 357 U. S. 197, 209–213 (1958). If there is no abuse of discretion in the application of the Rule 37 sanction, as we find to be the case here (see § III), then the sanction is nothing more than the invocation of a legal presumption, or what is the same thing, the finding of a constructive waiver.

Petitioners argue that a sanction consisting of a finding of personal jurisdiction differs from all other instances in which a sanction is imposed, including the the default judgment in *Hammond Packing*, because a party need not obey the orders of a court until it is established that the court has personal jurisdiction over that party. If there is no obligation to obey a judicial order, a sanction cannot be applied for the failure to comply. Until the court has established personal jurisdiction, moreover, any assertion of judicial power over the party violates due process.

This argument again assumes that there is something unique about the requirement of personal jurisdiction, which prevents it from being established or waived like other rights. A defendant is always free to ignore the judicial proceedings, risk a default judgment and then challenge that judgment on jurisidictional grounds in a collateral proceeding. See *Baldwin* v. *Traveling Men's Ass'n*, 283 U. S. 522, 525 (1931). By submitting to the jurisdiction of the court for the limited purpose of challenging jurisdiction, the defendant agrees to abide by that courts determination on the issue of jurisdiction: That decision will be *res judicata* on that issue in any further proceedings. *Id.*, at 524; *American Surety Co.* v. *Baldwin*, 287 U. S. 156, 166 (1932). As demonstrated above, the manner in which the court determines whether it has personal jurisdiction may include a variety of legal rules and presumptions, as well as straight forward fact-finding. A particular rule may offend the due process standard of *Hammond Packing*, but the mere use of procedural rules does not in itself violate the defendants due process rights.

III

Even if Rule 37(b)(2) may be applied to support a finding of personal jurisdiction, the question remains as to whether it was properly applied under the circumstances of this case. Because the district court's decision to invoke the sanction was accompanied by a detailed explanation of the reasons for that order and because that decision was upheld as a proper exercise of the district court's discretion by the Court of Appeals, this issue need not detain us for long. What was said in *National Hockey League* v. *Met. Hockey Club*, 427 U. S. 639, 642 (1976), is fully applicable here: "The question, of course, is not whether this Court, or whether the Court of Appeals, would as an original matter have [applied the sanction]; it is whether the District Court abused its discretion in so doing." (citations omitted). For the reasons that follow, we hold that it did not.

Rule 37(b)(2) contains two standards—one general and one specific—that limit a district court's discretion. First, any sanction must be "just;" second, the sanction must be specifically related to the particular "claim," which was at issue in the order to provide discovery. While the latter requirement reflects the rule of *Hammond Packing*, *supra*, the former represents the general due process restrictions on the court's discretion.

In holding that the sanction in this case was "just," we rely specifically on the following. First, the initial discovery request was made in July, 1977. Despite repeated orders from the court to provide the requested material, on December 21, 1978 the District Court was able to state that the petitioners "haven't even made any effort to get this information up to this point." 1 J.A. 112a. The court then warned petitioners of a possible sanction. Confronted with continued delay and an obvious disregard of its orders, the trial court's invoking of its powers under Rule 37 was clearly appropriate. Second, petitioners repeatedly agreed to comply with the discovery orders within specified time periods. In each instance, petitioners failed to comply with their agreements. Third, respondent's allegation that the court had personal jurisdiction over petitioners was not a frivolous claim and its attempt to use discovery to substantiate this claim was not, therefore, itself a misuse of judicial process. The substantiality of the jurisdictional allegation is demonstrated by the fact that the district court found, as an alternative ground for its jurisdiction, that petitioners had sufficient contacts with Pennsylvania to fall within the State's Long-Arm Statute. *Supra*, at 5. Fourth, petitioners had ample warning that a continued failure to comply with the discovery orders would lead to the imposition of this sanction. Furthermore, the proposed sanction made it clear that even if there was not compliance with the discovery order, this sanction would not be applied if petitioners were to "produce statistics and other information" that would indicate an absence of personal jurisdiction. 1 J.A. 116a. In effect, the district court simply placed the burden of proof upon petitioners on the issue of personal jurisdiction.[12] Petitioners failed to comply with the discovery order; they also failed to make any attempt to meet this burden of proof. This course of behavior coupled with the ample warnings demonstrate the "justice" of the trial court's order.

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[12] Counsel for petitioners agreed to this characterization of the sanction

Neither can there be any doubt that this sanction satisfies the second requirement. CBG was seeking through discovery to respond to petitioners' contention that the district court did not have personal jurisdiction. Having put the issue in question, petitioners did not have the option of blocking the reasonable attempt of CBG to meet its burden of proof. It surely did not have this option once the court had overruled petitioners' objections. Because of petitioners' failure to comply with the discovery orders, CBG was unable to establish the full extent of the contacts between petitioners and Pennsylvania, the critical issue in proving personal jurisdiction. Petitioners' failure to supply the requested information as to its contacts with Pennsylvania supports "the presumption that the refusal to produce evidence . . . was but an admission of the want of merit in the asserted defense." *Hammond Packaging, supra,* at 351. The sanction took as established the facts—contacts with Pennsylvania—that CBG was seeking to establish through discovery. That a particular legal consequence—personal jurisdiction of the court over the defendants—follows from this, does not in any way affect the appropriateness of the sanction.

IV

Because the application of a legal presumption to the issue of personal jurisdiction does not in itself violate the due process clause and because there was no abuse of the discretion granted a district court under Rule 37(b)(2), we affirm the judgment of the Court of Appeals.

So ordered.

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at oral argument. Trans. of Oral Arg., at 47–48.

[illegible]

IV

[illegible] judgment of the Court of Appeals.

It is so ordered.

[illegible]

SUPREME COURT OF THE UNITED STATES

No. 81-440

INSURANCE CORPORATION OF IRELAND, LTD. ET AL., PETITIONERS *v.* COMPAGNIE DES BAUXITES DE GUINEA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

[June 1, 1982]

JUSTICE POWELL, concurring in the judgment.

The Court rests today's decision on a constitutional distinction between "subject matter" and "*in personam*" jurisdiction. Under this distinction, subject matter jurisdiction defines an Article III limitation on the power of federal courts. By contrast, the Court characterizes the limits on *in personam* jurisdiction solely in terms of waivable personal rights and notions of "fair play." Having done so, it determines that fundamental questions of judicial power do not arise in this case concerning the personal jurisdiction of a federal district court.

In my view the Court's broadly theoretical decision misapprehends the issues actually presented for decision. Federal courts are courts of limited jurisdiction. Their personal jurisdiction, no less than their subject matter jurisdiction, is subject both to constitutional and to statutory definition. When the applicable limitations on federal jurisdiction are identified, it becomes apparent that the Court's theory could require a sweeping but largely unexplicated revision of jurisdictional doctrine. This revision could encompass not only the personal jurisdiction of federal courts but "sovereign" limitations on state jurisdiction as identified in *World-Wide Volkswagen Corp.* v. *Woodson*, 444 U. S. 286, 291-293

(1980). Fair resolution of this case does not require the Court's broad holding. Accordingly, although I concur in the Court's judgment, I cannot join its opinion.

I

This lawsuit began when the respondent Compagnie de Bauxites brought a contract action against the petitioner insurance companies in the United States District Court for the Western District of Pennsylvania. Alleging diversity jurisdiction, respondent averred that the District Court had personal jurisdiction of the petitioners, all foreign corporations, under the long-arm statute of the State of Pennsylvania. See *Compagnie des Bauxites de Guinea* v. *Insurance Co. of North America*, 651 F. 2d 877, 880–881 (CA3 1981). Petitioners, however, denied that they were subject to the court's personal jurisdiction under that or any other statute. Viewing the question largely as one of fact, the court ordered discovery to resolve the dispute.

Meantime, while respondents unsuccessfully sought compliance with their discovery requests, petitioners brought a parallel action in England's High Court of Justice, Queens Bench Division. It was at this juncture that the current issues arose. Seeking to enjoin the English proceedings, respondents sought an injunction in the District Court. Petitioners protested that they were not subject to that court's personal jurisdiction and thus that they lay beyond its injunctive powers. But the District Court disagreed. As a jurisdictional prerequisite to its entry of the injunction, the court upheld its personal jurisdiction over petitioners.[1] It characterized its finding of jurisdiction partly as a sanction for petitioners' noncompliance with its discovery orders under Fed. Rule Civ. Proc. 37(b).[2]

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[1] A district court must have personal jurisdiction over a party before it can enjoin its actions. *Zenith Radio Corp.* v. *Hazeltine Research*, 395 U. S. 100, 111–112 (1969).

[2] The court also found that appellants in fact had undertaken sufficient

Rule 37(b) is not, however, a jurisdictional provision. As recognized by the Court of Appeals, the governing jurisdictional statute remains the long-arm statute of the State of Pennsylvania. See 651 F. 2d, at 881. In my view the Court fails to make clear the implications of this central fact: that the District Court in this case relied on state law to obtain personal jurisdiction.

As courts of limited jurisdiction, the federal district courts possess no warrant to create jurisdictional law of their own. Under the Rules of Decision Act, 28 U. S. C. § 1652, 62 Stat. 944, they must apply state law "except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide. . . ." See generally *Erie R. Co.* v. *Tompkins*, 304 U. S. 64 (1938). Thus, in the absence of a federal rule or statute establishing a federal basis for the assertion of personal jurisdiction, the personal jurisdiction of the district courts is determined in diversity cases by the law of the forum State. See, *e. g.*, *Intermeat, Inc.* v. *American Poultry Co.*, 575 F. 2d 1017 (CA2 1975); *Wilkerson* v. *Fortuna Corp.*, 554 F. 2d 745 (CA 5), cert. denied, 434 U. S. (1977); *Poyner* v. *Erma Werke GMBH*, 618 F. 2d 1186, 1187 (CA6 1980); *Lakeside Bridge & Steel Corp.* v. *Mountain St. Constr. Co.*, 597 F. 2d 596 (CA7 1979), cert. denied, 445 U. S. 907 (1980); *Lakota Girl Scout Council* v. *Havey Fundraising Management, Inc.*, 519 F. 2d 634 (CA8 1975); *Arrowsmith* v. *United Press International*, 320 F. 2d 219, 226 (CA2 1963); *Forsythe* v. *Overmyer*, 576 F. 2d 779, 782 (CA9 1978), cert. denied, 439 U. S. 864; *Quarles* v. *Fuqua Indus., Inc.*, 504 F. 2d 1358 (CA10 1974).[3]

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business activity in the State to bring them within the reach of the Pennsylvania long-arm statute. See Pet. App. 51, 53.

[3] As Judge Friendly explained in the leading case of *Arrowsmith* v. *United Press International*, 320 F. 2d 219, 226 (1963):

"State statutes determining what foreign corporations may be sued, for what, and by whom, are not mere whimsy; like most legislation they represent a balancing of various considerations—for example, affording a forum for wrongs connected with the state and conveniencing resident plaintiffs, As a result of the District Court's dependence on the law of Pennsylvania to establish personal jurisdiction—a dependence mandated by Congress under 28 U. S. C. § 1652—its jurisdiction in this case normally would be subject to the same due process limitations as a state court. See, *e. g.*, *Forsythe* v. *Overmyer*, *supra*, at 1020; *Washington* v. *Norton Mfg., Inc.*, 588 F. 2d 441, 445 (CA5 1975); *Fisons, Ltd.* v. *United States*, 458 F. 2d 1241, 1250 (CA7 1972).[4] Thus, the question arises how today's decision is related to cases restricting the personal jurisdiction of the States.

Before today our decisions had established that "minimum contacts" represented a constitutional prerequisite to the exercise of *in personam* jurisdiction over an unconsenting defendant. See, *e. g.*, *World-Wide Volkswagen Corp.* v. *Woodson*, *supra*, at 291–293; *Hanson* v. *Denckla*, 357 U. S. 235, 251 (1958); *International Shoe Co.* v. *Washington*, 326 U. S. 310, 316 (1945). In the absence of a showing of minimum contacts, a finding of personal jurisdiction over an unconsenting defendant, even as a sanction, therefore would appear to transgress previously established constitutional limitations. The cases cannot be reconciled by a simple distinction between the constitutional limits on state and federal courts. Because of the District Court's reliance on the Pennsylvania long-arm statute—the applicable jurisdictional provision under the Rules of Decisions Act—the relevant constitutional limits would not be those imposed directly on federal courts by the Due Process Clause of the Fifth Amendment, but those applicable to state jurisdictional law under the Fourteenth.

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while avoiding the discouragement of activities within the state by foreign corporations. We see nothing in the concept of diversity jurisdiction that should lead us to read into the governing statutes a Congressional mandate, unexpressed by Congress itself, to disregard the balance struck by the states."

[4] It is not contended that there is any federal basis for the exercise of personal jurisdiction by the District Court.

The Court's decision apparently must be understood as related to our state jurisdictional cases in one of two ways. Both involve legal theories that fail to justify the doctine adopted by the Court in this case.

A

Under traditional principles, the due process question in this case is whether "minimum contacts" exist between petitioners and the forum State that would justify the State in exercising personal jurisdiction. See, *e. g., World-Wide Volkswagen Corp.* v. *Woodson, supra,* at 291–293; *Shaffer* v. *Heitner,* 433 U. S. 186, 216 (1977); *Hanson* v. *Denckla, supra,* at 251. By finding that the establishment of minimum contacts is not a prerequisite to the exercise of jurisdiction to impose sanctions under Fed. Rule Civ. Proc. 37, the Court may be understood as finding that "minimum contacts" no longer is a constitutional requirement for the exercise by a state court of personal jurisdiction over an unconsenting defendant.[5] Whenever the Court's notions of fairness are not offended, jurisdiction apparently may be upheld.

Before today, of course, our cases had linked minimum contacts and fair play as *jointly* defining the "sovereign" limits on state assertions of personal jurisdiction over unconsenting defendants. See *World-Wide Volkswagen Corp.* v. *Woodson, supra,* at 292–293; see *Hanson* v. *Deckla, supra,* at 251. The Court appears to abandon the rationale of these cases in a footnote. See *ante,* at 9 and n. 10. But it does not address the implications of its action. By eschewing reliance on the concept of minimum contacts as a "sovereign" limitation on the power of States—for, again, it is the State's long-arm statute that is invoked to obtain personal jurisdiction in the District Court—the Court today effects a potentially substantial change of law. For the first time it defines personal jurisdiction solely by reference to abstract notions of fair play. And, astonishingly to me, it does so in a case in which this rationale for decision was neither argued nor briefed by the parties.

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[5] The Court refers to the respondent's prima facie showing of "minimum contacts" only as one factor indicating that the District Court did not abuse its discretion in entering a finding of personal jurisdiction as a sanction under Rule 37(b). See *ante,* at 13–14. Generally it views the requirement of personal jurisdiction as a right that may be "established or waived like other rights." *Ante,* at 12.

B

Alternatively, it is possible to read the Court opinion, not as affecting state jurisdiction, but simply as asserting that Rule 37 of the Federal Rules of Civil Procedure represents a congressionally approved basis for the exercise of personal jurisdiction by a federal district court. On this view Rule 37 vests the federal district courts with authority to take jurisdiction over persons not in compliance with discovery orders. This of course would be a more limited holding. Yet the Court does not cast its decision in these terms. And it provides no support for such an interpretation, either in the language or in the history of the Federal Rules.

In the absence of such support, I could not join the Court in embracing such a construction of the Rules of Civil Procedure.[6] There is nothing in Rule 37 to suggest that it is intended to confer a grant of personal jurisdiction. Indeed, the clear language of Rule 82 seems to establish that Rule 37 should *not* be construed as a jurisdictional grant: "These rules shall not be construed to extend . . . the jurisdiction of the United States district courts or the venue of actions therein." Moreover, assuming that minimum contacts remain a constitutional predicate for the exercise of a State's *in personam* jurisdiction over an unconsenting defendant, constitutional questions would arise if Rule 37 were read to permit a plaintiff in a diversity action to subject a defendant to a "fishing expedition" in a foreign jurisdiction. A plaintiff is not entitled to discovery to establish essentially speculative allegations necessary to personal jurisdiction. Nor would the use of Rule 37 sanctions to enforce discovery orders constitute a mere abuse of discretion in such a case.[7] For me at least, such a use of discovery would raise serious questions as to the constitutional as well as the statutory authority of a federal court—in a diversity case—to exercise personal jurisdiction absent some showing of minimum contacts between the unconsenting defendant and the forum State.

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[6] Jurisdiction over the person generally is dealt with by Rule 4, governing the methods of service through which personal jurisdiction may be obtained. Although Rule 4 deals expressly only with service of process, not with the underlying jurisdictional prerequisites, jurisdiction may not be obtained unless process is served in compliance with applicable law. See, *e. g., Intermeat, Inc.* v. *American Poultry Co.*, 575 F. 2d 1017 (CA2 1975); *Washington* v. *Norton Mfg., Inc.*, 588 F. 2d 441, 445 (CA5 1975); D. Currie, Federal Courts 858 (1975 ed.). For this reason Rule 4 frequently has been characterized as a jurisdictional provision. See, *e. g.*, 379 U. S. 869 (1963) (Statement of Justices Black and Douglas, dissenting from adoption of amendments to the Federal Rules of Civil Procedure); D. Currie, Federal Courts 858 (1975 ed.); Foster, Long-Arm Jurisdiction in Federal Courts, 1969 Wisc. L. Rev. 1, 11. As applicable here, Rule 4 relies expressly on state law. See Fed. Rule Civ. Proc. 4(d)(7) and (e).

II

In this case the facts alone—unaided by broad jurisdictional theories—more than amply demonstrate that the District Court possessed personal jurisdiction to impose sanctions under Rule 37 and otherwise to adjudicate this case. I would decide the case on this narrow basis.

As recognized both by the District Court and the Court of Appeals, the respondent adduced substantial support for its jurisdictional assertions. By affidavit and other evidence, it made a *prima facie* showing of "minimum contacts." See 651 F. 2d, at 881–882, 886 and n. 9. In the view of the District Court, the evidence adduced actually was sufficient to sustain a finding of personal jurisdiction independently of the Rule 37 sanction. Pet. App. 51, 53.[8]

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[7] Compare the Court's view. *Ante*, at 13.

[8] The Court of Appeals deemed it unnecessary to review this alternative

Where the plaintiff has made a prima facie showing of minimum contacts, I have little difficulty in holding that its showing was sufficient to warrant the District Court's entry of discovery orders. And where a defendant then fails to comply with those orders, I agree that the prima facie showing may be held adequate to sustain the court's finding that minimum contacts exist, either under Rule 37 or under a theory of "presumption" or "waiver."

Finding that the decision of the Court of Appeals should be affirmed on this ground, I concur in the judgment of the Court.

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basis for the District Court's finding of jurisdiction. See *id.*, at 886 and n. 9.

READEX
FICHE

All issues available have been filmed.
Unfortunately, any scattered missing issues are no longer available.

981/81-450

(Slip Opinion)

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Lumber Co.*, 200 U. S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

UNITED STATES *v.* VALENZUELA-BERNAL

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 81-450. Argued April 20, 1982—Decided July 2, 1982

Respondent was indicted in Federal District Court for transporting one Romero-Morales in violation of 8 U. S. C. § 1324(a)(2), which prohibits the knowing transportation of an alien illegally in the United States who last entered the country within three years prior to the date of the transportation. Two other illegal aliens—who, with Romero-Morales, were passengers in the car being driven by respondent and were apprehended with respondent—were deported after an Assistant United States Attorney concluded that they possessed no evidence material to respondent's prosecution. Romero-Morales was detained to provide a nonhearsay basis for establishing that respondent had violated § 1324(a)(2). The District Court denied respondent's motion to dismiss the indictment on the asserted ground that the deportation of the other passengers deprived him of the opportunity to interview them to determine whether they could aid in his defense and thus violated his Fifth Amendment right to due process and his Sixth Amendment right to compulsory process for obtaining witnesses. Following a bench trial respondent was convicted, but the Court of Appeals reversed, holding that although a constitutional violation occurs only when "the alien's testimony could conceivably benefit the defendant," the "conceivable benefit" test was satisfied—without requiring the defendant to explain what beneficial evidence would have been provided by the alien—whenever, as here, the deported alien was an eyewitness to the crime.

Held: Respondent failed to establish a violation of the Fifth or Sixth Amendment. Pp. 5-16.

(a) In cases like this, the Executive Branch's responsibility faithfully to execute Congress' immigration policy of prompt deportation of illegal aliens justifies deportation of illegal-alien witnesses upon the Executive's good-faith determination that they possess no evidence favorable to the

Ju6.8/b:

defendant in a criminal prosecution. In addition to satisfying such policy, the prompt deportation of such witnesses is justified by practical considerations, including the financial and physical burdens imposed upon the Government in detaining alien eyewitnesses. Pp. 5–7.

(b) Respondent cannot establish a violation of the Sixth Amendment, which guarantees a criminal defendant the right to compulsory process for obtaining witnesses "in his favor," merely by showing that deportation of the aliens deprived him of their testimony. He must at least make some plausible showing of how their testimony would have been both material and favorable to his defense. Cf. *Washington* v. *Texas*, 388 U. S. 14. While a relaxation of the specificity required in showing materiality may be supported by the fact that, because the witnesses were deported, neither respondent nor his attorney had an opportunity to interview the witnesses to determine what favorable information they possessed, this does not afford a basis for wholly dispensing with a showing of materiality. Cf. *Roviaro* v. *United States*, 353 U. S. 53. Moreover, respondent was present throughout the commission of the crime, and no one knew better than he what the deported witnesses said in his presence that might bear upon whether he knew that Romero-Morales was an illegal alien who had entered the country within the past three years. Pp. 8–13.

(c) At least the same materiality requirement obtains with respect to a due process claim. In order to establish a denial of due process, the acts complained of must be of such quality as necessarily prevents a fair trial. Such an absence of fairness is not made out by the Government's deportation of the witnesses here unless there is some explanation of how their testimony would have been favorable and material. Pp. 13–14.

(d) Sanctions against the Government are warranted for deportation of alien witnesses only if there is a reasonable likelihood that the testimony could have affected the judgment of the trier of fact. In this case, respondent made no effort to explain what material, favorable evidence the deported aliens would have provided for his defense. Pp. 14–15.

647 F. 2d 72, reversed.

REHNQUIST, J., delivered the opinion of the Court, in which BURGER, C. J., and WHITE, POWELL, and STEVENS, JJ., joined. BLACKMUN and O'CONNOR, JJ., filed opinions concurring in the judgment. BRENNAN, J., filed a dissenting opinion, in which MARSHALL, J., joined.

NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D.C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

SUPREME COURT OF THE UNITED STATES

No. 81-450

UNITED STATES, PETITIONER *v.* RICARDO VALENZUELA-BERNAL

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

[July 2, 1982]

JUSTICE REHNQUIST delivered the opinion of the Court.

Respondent, a citizen of Mexico, was indicted in United States District Court for the Southern District of California for transporting one Romero-Morales in violation of 8 U. S. C. § 1324(a)(2). That section generally prohibits the knowing transportation of an alien illegally in the United States and who last entered the country within three years prior to the date of the transportation.[1] Respondent was found guilty after a bench trial, but his conviction was overturned by the United States Court of Appeals for the Ninth Circuit. That court held that the action of the Government in deporting two aliens other than Romero-Morales violated respondent's right under the Sixth Amendment to the United States Constitution to compulsory process, and his right under the Fifth Amendment to due process of law. We granted certiorari in order to review the Court of Appeals' application of these constitutional provisions to this case, 454 U. S. 963 (1981),[2] and we now reverse.

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[1] Section 1324(a)(2) applies to "[a]ny person" who "transports, or moves, or attempts to transport or move," "any alien," "knowing that [the alien] is in the United States in violation of law, and knowing or having reasonable grounds to believe that his last entry into the United States occurred less than three years prior" to the transportation or attempted transportation with which the person is charged. 8 U. S. C. § 1324(a)(2).

[2] Other Courts of Appeals have adopted slight variations of the position

I

Respondent entered the United States illegally on March 23, 1980 and was taken by smugglers to a house in Escondido, California. Six days later, in exchange for his not having to pay the smugglers for bringing him across the border, respondent agreed to drive himself and five other passengers to Los Angeles. When the car which respondent was driving approached the Border Patrol checkpoint at Temecula, agents noticed the five passengers lying down inside of the car and motioned to respondent to stop. Respondent accelerated through the checkpoint and was chased at high speed for approximately one mile before stopping the car and fleeing on foot along with the five passengers. Three of the passengers and respondent were apprehended by the Border Patrol agents.

Following their arrest, respondent and the other passengers were interviewed by criminal investigators. Respondent admitted his illegal entry into the country and explained his reason for not stopping at the checkpoint: "I was bringing the people [and] I already knew I had had it—too late—it was done." App. 27. The three passengers also admitted that they were illegally in the country and each identified respondent as the driver of the car. *Id.*, at 66. An Assistant United States Attorney concluded that the passengers possessed no evidence material to the prosecution or defense of respondent for transporting illegal aliens, and two of the passengers were deported to Mexico. The third, Enrique Romero-Morales, was detained to provide a non-hearsay basis for establishing that respondent had transported an illegal alien in violation of 8 U. S. C. § 1324(a)(2).

Respondent moved in the District Court to dismiss the in-

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held by the Court of Appeals for the Ninth Circuit. See, e. g., *United States* v. *Armijo-Martinez*, —— F. 2d —— (CA6 1982); *United States* v. *Rose*, 669 F. 2d 23 (CA1 1982); *United States* v. *Avila-Dominguez*, 610 F. 2d 1266 (CA5 1980); *United States* v. *Calzada*, 579 F. 2d 1358 (CA7 1978).

dictment, claiming that the Government's deportation of the two passengers other than Romero-Morales violated his Fifth Amendment right to due process of law and his Sixth Amendment right to compulsory process for obtaining favorable witnesses. He claimed that the deportation had deprived him of the opportunity to interview the two remaining passengers to determine whether they could aid in his defense. Although he had been in their presence throughout the allegedly criminal activity, respondent made no attempt to explain how the deported passengers could assist him in proving that he did not know that Romero-Morales was an illegal alien who had last entered the United States within the preceding three years.

At least one evidentiary hearing was held on respondent's motion, at which Romero-Morales testified that he had not spoken to respondent during the entire time that they were together. At the same hearing the Government offered, without obtaining agreement by respondent, to stipulate that none of the passengers in the car told respondent that they were in the United States illegally. The District Court denied respondent's motion and, following a bench trial on stipulated evidence, found respondent guilty as charged.[3]

The Court of Appeals reversed the conviction. The court relied upon the rule, first stated in *United States* v. *Mendez-Rodriguez*, 450 F. 2d 1 (CA9 1971), that the Government violates the Fifth and Sixth Amendments when it deports alien witnesses before defense counsel has an opportunity to interview them. 647 F. 2d 72, 73–75 (1981). Although it stated that a constitutional violation occurs only when "the alien's testimony could conceivably benefit the defendant," *id.*, at 74, the court's application of the "conceivable benefit" test demonstrated that the test will be satisfied whenever the deported aliens were eyewitnesses to the crime.[4] Respondent's failure to explain what beneficial evidence would have been provided by the two passengers was thus inapposite, for "the deported aliens were eyewitnesses to, and active participants in, the crime charged, thus establishing a strong possibility that they could have provided material and relevant information concerning the events constituting the crime."

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[3] The Appendix contains excerpts of transcribed testimony from a hearing on June 2, 1980, at which the District Court heard arguments of counsel and the testimony of Romero-Morales. At the conclusion of this testimony, counsel for respondent proposed the highly unusual step of calling the Assistant United States Attorney as a witness. App. 45. The attorney testified at further proceedings held on June 12, 1980, and was interrogated, *inter alia*, about his understanding of various decisions of the Court of Appeals for the Ninth Circuit and about the Government's litigating strategy in these cases. App. 63–64. This procedure seems to us highly unusual, if not bizarre: ordinarily the litigating strategies of the United States Attorney are no more the subject of permissible inquiry by his opponent than would be the litigating strategies of the Public Defender by his opponent.

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[4] As the Court of Appeals explained:

"The conceivable benefit in *Mendez-Rodriguez* stemmed from the fact that the deported aliens were eyewitnesses to, and active participants in, the crime charged, so that there was a strong possibility that they could have provided material and relevant evidence concerning the events constituting the crime. Conversely, where a missing deported alien was not an eyewitness to the offense, we have been unwilling to assume that the alien's testimony could conceivably benefit the defendant." 647 F. 2d 72, 74 (1981) (citation and footnotes omitted).

As described by the Court of Appeals, the "conceivable benefit" test "impose[s] no requirement of government misconduct or negligence before dismissal of an indictment is warranted. Nor is a defendant required to show specific prejudice caused by the unavailability of the alien eyewitnesses." *Ibid.* (citation omitted). Other Courts of Appeals have recognized the Ninth Circuit rule as requiring no showing of prejudice, *United States* v. *Calzada*, *supra*, 579 F. 2d, at 1362, and as permitting dismissal of the indictment even when the "'record is completely devoid of anything which would suggest that the testimony of any one, or more, of the deported persons would have been helpful' to the defendants." *United States* v. *Avila-Dominguez*, *supra*, 610 F. 2d, at 1270–1271 (quoting *United States* v. *Mendez-Rodriguez*, 450 U. S. 1, 6 (CA9 1971) (Kilkenny, J., dissenting)).

Id., at 75. Accordingly, the Court of Appeals held that respondent's motion to dismiss the indicment should have been granted by the District Court.

II

We think that the decision of the Court of Appeals in this case, and some of the additional arguments made in support of it by respondent, misapprehend the varied nature of the duties assigned to the Executive Branch by Congress. The Constitution imposes on the President the duty to "take care that the laws be faithfully executed." U. S. Const., Art. II, § 3. One of the duties of the Executive Branch, and a vitally important one, is that of apprehending and obtaining the conviction of those who have violated criminal statutes of the United States. The prosecution of respondent is of course one example of the Executive's effort to discharge that responsibility.

But the Government is charged with a dual responsibility when confronted with incidents such as that which resulted in the apprehension of respondent. One or more of the persons in the car may have violated the criminal laws enacted by Congress; but some or all of the persons in the car may also be subject to deportation as provided by Congress. The Government may, therefore, find itself confronted with the obligation of prosecuting persons in the position of respondent on criminal charges, and at the same time obligated to deport other persons involved in the event in order to carry out the immigration policies that Congress has enacted.

The power to regulate immigration—an attribute of sovereignty essential to the preservation of any nation—has been entrusted by the Constitution to the political branches of the Federal Government. See *Mathews* v. *Diaz*, 426 U. S. 67, 81 (1976). "The Court without exception has sustained Congress' 'plenary power to make rules for the admission of aliens.'" *Kleindienst* v. *Mandel*, 408 U. S. 753, 766 (1972) (quoting *Boutilier* v. *INS*, 387 U. S. 118, 123 (1967)). In exercising this power, Congress has adopted a policy of apprehending illegal aliens at or near the border and deporting them promptly. Border Patrol agents are authorized by statute to make warrantless arrests of aliens suspected of "attempting to enter the United States in violation of . . . law," 8 U. S. C. § 1357(a)(2), and are directed to examine them without "unnecessary delay" to determine whether "there is prima facie evidence establishing" their attempted illegal entry. 8 CFR § 287.3. Aliens against whom such evidence exists may be granted immediate voluntary departure from the country. See 8 U. S. C. § 1252(b); 8 CFR § 242.5(a)(2)(i). Thus, Congress has determined that prompt deportation, such as occurred in this case, constitutes the most effective method for curbing the enormous flow of illegal aliens across our southern border.[5]

In addition to satisfying immigration policy, the prompt deportation of alien witnesses who are determined by the Government to possess no material evidence relevant to a criminal trial is justified by several practical considerations. During fiscal year 1979, almost one-half of the more than 11,000 inmates incarcerated in federal facilities in the Southern District of California were material witnesses who had neither been charged with nor convicted of a criminal offense. App. 18. The average period of detention for such witnesses exceeded five days, and many were detained for more than twenty days. *Id.*, at 20. The resulting overcrowded conditions forced the Government to house many detainees in federal facilities located outside of the Southern District of California or in state-operated jails. *Id.*, at 21–22; Brief for Petitioner 19. Thus, the detention of alien eyewitnesses imposes substantial financial and physical burdens upon the Government, not to mention the human cost to potential witnesses who are incarcerated though charged with no crime. In addition, the rule adopted by the Court of Appeals significantly constrains the Government's prosecutorial discretion. As explained by the United States:

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[5] As evidence of the effectiveness of Congress' policy and of the colossal problem presented by illegal entries from Mexico, the United States notes that approximately one million illegal aliens were detained by Border Patrol officials during each of the three years preceding 1981. Brief for Petitioner 19; see U. S. Department of Justice, *U. S. Border Patrol Management of the Mexican Border* 1, 6 (1981).

> "Because of budget limitations and the unavailability of adequate detention facilities, it is simply impossible as a practical matter to prosecute many cases involving the transportation or harboring of large numbers of illegal aliens, where all aliens must be incarcerated for a substantial period of time to avoid dismissal of the charges, even though the prosecution's case may be overwhelming. As a consequence, many valid and appropriate prosecutions are foregone." Brief for Petitioner 21–22.

It simply will not do, therefore, to minimize the Government's dilemma in cases like this with statements such as "[t]he prosecution may not deny access to a witness by hiding him out. See *Freeman* v. *State of Georgia*, 599 F. 2d 65 (5th Cir. 1979) (police detective concealed location of witness)." Brief for Respondent 35. Congress' immigration policy and the practical considerations discussed above demonstrate that the Government had good reason to deport respondent's passengers once it concluded that they possessed no evidence relevant to the prosecution or the defense of respondent's criminal charge. No onus, in the sense of "hiding out" or "concealing" witnesses, attached to the Government by reason of its discharge of the obligations imposed upon it by Congress; its exercise of these manifold responsibilities is not to be judged by standards which might be appropriate if the Government's only responsibility were to prosecute criminal offenses.

III

Viewing the Government's conduct in this light, we turn to the evaluation of the Court of Appeals' "conceivable benefit" test. There seems to us to be little doubt that this test is a virtual "*per se*" rule which requires little if any showing on the part of the accused defendant that the testimony of the absent witness would have been either favorable or material. As we said with respect to a similar test—phrased in terms of information "that might affect the jury's verdict"—for determining when a prosecutor must disclose information to a criminal defendant:

> "If everything that might influence a jury must be disclosed, the only way a prosecutor could discharge his constitutional duty would be to allow complete discovery of his files as a matter of routine practice." *United States* v. *Agurs*, 427 U. S. 97, 109 (1976).

So it is with the "conceivable benefit" test. Given the vagaries of a typical jury trial, it would be a bold statement indeed to say that the testimony of any missing witness could not have "conceivably benefited" the defense. To us, the number of situations which will satisfy this test is limited only by the imaginations of judges or defense counsel.[6]

A

The only recent decision of this Court dealing with the right to compulsory process guaranteed by the Sixth Amendment suggests that more than the mere absence of testimony is necessary to establish a violation of the right. See *Washington* v. *Texas*, 388 U. S. 14 (1967). Indeed, the Sixth Amendment does not by its terms grant to a criminal defendant the right to secure the attendance and testimony of any and all witnesses: it guarantees him "compulsory process for obtaining *witnesses in his favor*." U. S. Const., Amdt. 6 (emphasis added). In *Washington*, this Court found a violation of this clause of the Sixth Amendment when the defendant was arbitrarily deprived of "testimony [that] would have been *relevant* and *material*, and . . . *vital* to the defense."

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[6] See note 4, *supra*.

388 U. S., at 17 (emphasis added). This language suggests that respondent cannot establish a violation of his constitutional right to compulsory process merely by showing that deportation of the passengers deprived him of their testimony. He must at least make some plausible showing of how their testimony would have been both material and favorable to his defense.[7]

When we turn from *Washington* to other cases in what might loosely be called the area of constitutionally guaranteed access to evidence, we find *Washington*'s intimation of a materiality requirement more than borne out. *Brady* v. *Maryland*, 373 U. S. 83 (1963), held "that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." *Id.*, at 87. This materiality requirement was emphasized in *Moore* v. *Illinois*, 408 U. S. 786 (1972), where we stated that a defendant will prevail upon a *Brady* claim "where the evidence is favorable to the accused and is material either to guilt or to punishment." *Id.*, at 794. And in *United States* v. *Agurs*, 427 U. S. 97 (1976), we noted that "[a] fair analysis of the holding in *Brady* indicates that implicit in the requirement of materiality is a concern that the suppressed evidence might have affected the outcome of the trial." *Id.*, at 104. We further explained:

> "The proper standard of materiality must reflect our overriding concern with the justice of the finding of guilt. . . . This means that the omission must be evaluated in the context of the entire record. If there is no

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[7] That the Sixth Amendment does not guarantee criminal defendants the right to compel the attendance of any and all witnesses is reflected in the Federal Rules of Criminal Procedure. Rule 17(b) requires the Government to subpoena witnesses on behalf of indigent defendants, but only "upon a satisfactory showing . . . that the presence of the witness is necessary to an adequate defense." See also, *Isaacs* v. *United States*, 159 U. S. 487, 489 (1895); *Crumpton* v. *United States*, 138 U. S. 361, 364–365 (1891).

> reasonable doubt about guilt whether or not the additional evidence is considered, there is no justification for a new trial. On the other hand, if the verdict is already of questionable validity, additional evidence of relatively minor importance might be sufficient to create a reasonable doubt." *Id.*, at 112–113 (footnote omitted).

Similarly, when the Government has been responsible for delay resulting in a loss of evidence to the accused, we have recognized a constitutional violation only when loss of the evidence prejudiced the defense. In *United States* v. *Marion*, 404 U. S. 307 (1972), for example, the Court held that preindictment delay claims were governed by the Due Process Clause of the Fifth Amendment, not by the speedy-trial guarantee of the Sixth Amendment. Elaborating on the nature of the guarantee provided by the Due Process Clause in such cases, the Court emphasized the requirement of materiality:

> "Nor have appellees adequately demonstrated that the pre-indictment delay by the Government violated the Due Process Clause. No actual prejudice to the conduct of the defense is alleged or proved, and there is no showing that the Government intentionally delayed to gain some tactical advantage over appellees or to harass them." *Id.*, at 325.

Five years later, in *United States* v. *Lovasco*, 431 U. S. 783 (1977), we summarized this aspect of *Marion*:

> "Thus *Marion* makes clear that proof of prejudice is generally a necessary but not sufficient element of a due process claim, and that the due process inquiry must consider the reasons for the delay as well as the prejudice to the accused." *Id.*, at 790.

The same "prejudice" requirement has been applied to cases of post-indictment delay. In *Barker* v. *Wingo*, 407 U. S. 514 (1972), the Court set forth several factors to be considered in determining whether an accused has been denied his Sixth Amendment right to a speedy trial by the Government's pre-trial delay. One of the four factors identified by the Court, and a factor more fully discussed in *United States* v. *MacDonald*, 435 U. S. 850, 858–859 (1978), was whether there had been any "prejudice to the defendant from the delay." *Id.*, at 858. Although the Court recognized that prejudice may take the form of "oppressive pretrial incarceration" or "anxiety and concern of the accused," the "most serious" consideration, analogous to considerations in this case, was impairment of the ability to mount a defense. See 435 U. S., at 858 (quoting *Barker* v. *Wingo*, 407 U. S., at 532). Thus, other interests protected by the Sixth Amendment look to the degree of prejudice incurred by a defendant as a result of governmental action or inaction.

The principal difference between these cases in related areas of the law and the present case is that respondent simply had no access to the witnesses who were deported after he was criminally charged. Respondent contends that requiring him to show materiality is unreasonable in light of the fact that neither he nor his attorney was afforded an opportunity to interview the deported witnesses to determine what favorable information they possessed. But while this difference may well support a relaxation of the specificity required in showing materiality, we do not think that it affords the basis for wholly dispensing with such a showing.

The closest case in point is *Roviaro* v. *United States*, 353 U. S. 53 (1957). While *Roviaro* was not decided on the basis of constitutional claims, its subsequent affirmation in *McCray* v. *Illinois*, 386 U. S. 300 (1967), where both due process and confrontation claims were considered by the Court, suggests that *Roviaro* would not have been decided differently if those claims had actually been called to the Court's attention.

Roviaro deals with the obligation of the prosecution to disclose to the defendant the name of an informer-eyewitness, and was cast in terms of the traditional governmental privilege to refuse disclosure of such an identity. The *Roviaro* Court held that the informer's identity had to be disclosed, but only after it concluded that the informer's testimony would be highly relevant:

> "This is a case where the Government's informer was the sole participant, other than the accused, in the transaction charged. The informer was the only witness in a position to amplify or contradict the testimony of government witnesses. Moreover, a government witness testified that [the informer] denied knowing petitioner or ever having seen him before. We conclude that, under these circumstances, the trial court committed prejudicial error in permitting the Government to withhold the identity of its undercover employee in the face of repeated demands by the accused for his disclosure." 353 U. S., at 64–65.

"What *Roviaro* thus makes clear is that this Court was unwilling to impose any absolute rule requiring disclosure of an informer's identity," *McCray* v. *Illinois*, 386 U. S., at 311, despite the fact that criminal defendants otherwise have no access to such informers to determine what relevant information they possess. *Roviaro* supports the conclusion that while a defendant who has not had an opportunity to interview a witness may face a difficult task in making a showing of materiality, the task is not an impossible one. In such circumstances it is of course not possible to make any avowal of *how* a witness may testify. But the events to which a witness might testify, and the relevance of those events to the crime charged, may well demonstrate either the presence or absence of the required materiality.

In addition, it should be remembered that respondent was present throughout the commission this crime. No one knows better than he what the deported witnesses actually said to him, or in his presence, that might bear upon whether he knew that Romero-Morales was an illegal alien who had entered the country within the past three years. And, in light of the actual charge made in the indictment, it was only the status of Romero-Morales which was relevant to the defense. Romero-Morales, of course, remained fully available for examination by the defendant and his attorney. We thus conclude that the respondent can establish no Sixth Amendment violation without making some plausible explanation of the assistance he would have received from the testimony of the deported witnesses.[8]

B

Having borrowed much of our reasoning with respect to the Compulsory Process Clause of the Sixth Amendment from cases involving the Due Process Clause of the Fifth Amendment, we have little difficulty holding that at least the same materiality requirement obtains with respect to a due process claim. Due process guarantees that a criminal defendant will be treated with "that fundamental fairness essential to the very concept of justice. In order to declare a denial of it we must find that the absence of that fairness fatally infected the trial; the acts complained of must be of such quality as necessarily prevents a fair trial." *Lisenba* v. *California*, 314 U. S. 219, 236 (1941). In another setting, we recognized that Jencks Act violations, wherein the Government withholds evidence required by statute to be disclosed, rise to the level of due process violations only when they so infect the fairness of the trial as to make it "more a spectacle or trial by ordeal than a disciplined contest." *United States* v. *Augenblick*, 393 U. S. 348 (1969) (citations omitted). Such an absence of fairness is not made out by the Government's deportation of the witnesses in this case unless there is some explanation of how their testimony would have been favorable and material. See *United States* v. *Lovasco, supra*, 431 U. S. 783; *United States* v. *Marion*, *supra*, 404 U. S. 307.

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[8] Respondent's knowledge of the truth distinguishes this case from *United States* v. *Burr*, 25 F. Cas. 187 (C.C.D. Va. 1807) (No. 14,694), a case cited by respondent in support of his argument that it is unreasonable to require him to explain the relevance of the missing testimony. In *Burr*, Chief Justice Marshall found it unreasonable to require Aaron Burr to explain the relevancy of General Wilkinson's letter to President Jefferson, upon which the President's allegations of treason were based, precisely because Burr had never read the letter and was unaware of its contents. In this case, respondent observed the passengers, heard their comments, and is fully aware of the ways in which they influenced his knowledge about the status of Romero-Morales.

IV

To summarize, the responsibility of the Executive Branch faithfully to execute the immigration policy adopted by Congress justifies the prompt deportation of illegal-alien witnesses upon the Executive's good-faith determination that they possess no evidence favorable to the defendant in a criminal prosecution. The mere fact that the Government deports such witnesses is not sufficient to establish a violation of the Compulsory Process Clause of the Sixth Amendment or the Due Process Clause of the Fifth Amendment. A violation of these provisions requires some showing that the evidence lost would be both material and favorable to the defense.

Because prompt deportation deprives the defendant of an opportunity to interview the witnesses to determine precisely what favorable evidence they possess, however, the defendant cannot be expected to render a detailed description of their lost testimony. But this does not, as the Court of Appeals concluded, relieve the defendant of the duty to make some showing of materiality. Sanctions may be imposed on the Government for deporting witnesses only if the criminal defendant makes a plausible showing that the testimony of the deported witnesses would have been material and favorable to his defense, in ways not merely cumulative to the testimony of available witnesses. In some cases such a showing may be based upon agreed facts, and will be in the nature of a legal argument rather than a submission of additional facts. In other cases the criminal defendant may advance additional facts, either consistent with facts already known to the court or accompanied by a reasonable explanation for their inconsistency with such facts, with a view to persuading the court that the testimony of a deported witness would have been material and favorable to his defense.[9] Because in the latter situation the explanation of materiality is testimonial in nature, and constitutes evidence of the prejudice incurred as a result of the deportation, it should be verified by oath or affirmation of either the defendant or his attorney. See Fed. Rule Evid. 603; Fed. Rule Crim. Proc. 47.

As in other cases concerning the loss of of material evidence, sanctions will be warranted for deportation of alien witnesses only if there is a reasonable likelihood that the testimony could have affected the judgment of the trier of fact. See *Giglio* v. *United States*, 405 U. S. 150, 154 (1972). In making such a determination, courts should afford some leeway for the fact that the defendant necessarily proffers a description of the material evidence rather than the evidence itself. Because determinations of materiality are often best made in light of all of the evidence adduced at trial, judges may wish to defer ruling on motions until after the presentation of evidence.[10]

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[9] In adopting this standard, we express no opinion on the showing which a criminal defendant must make in order to obtain compulsory process for securing the attendance at his criminal trial of witnesses within the United States.

[10] The counsel of *United States* v. *Agurs*, 427 U. S. 97, 112–113 (1976), is helpful here:

"[T]he omission must be evaluated in the context of the entire record. If there is no reasonable doubt about guilt whether or not additional evidence is considered, there is no justification for a new trial. On the other hand, if the verdict is already of questionable validity, additional evidence of relatively minor importance might be sufficient to create a reasonable doubt."

In this case the respondent made no effort to explain what material, favorable evidence the deported passengers would have provided for his defense. Under the principles set forth today, he therefore failed to establish a violation of the Fifth or Sixth Amendments, and the District Court did not err in denying his motion to dismiss the indictment. Accordingly, the judgment of the Court of Appeals is

Reversed.

SUPREME COURT OF THE UNITED STATES

No. 81-450

UNITED STATES, PETITIONER *v.* RICARDO VALENZUELA-BERNAL

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

[July 2, 1982]

JUSTICE BLACKMUN, concurring in the judgment.

I concur in the judgment of the Court essentially for the reasons set forth by Judge Roney, in writing for a panel of the former Fifth Circuit, in *United States* v. *Avila-Dominguez*, 610 F. 2d 1266, 1269–1270, cert. denied *sub nom. Perez* v. *United States*, 449 U. S. 887 (1980). At least a "plausible theory" of how the testimony of the deported witnesses would be helpful to the defense must be offered. None was advanced here; therefore, the motion to dismiss the indictment was properly denied by the District Court.

SUPREME COURT OF THE UNITED STATES

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SUPREME COURT OF THE UNITED STATES

No. 81-450

UNITED STATES, PETITIONER *v.* RICARDO VALENZUELA-BERNAL

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

[July 2, 1982]

JUSTICE O'CONNOR, concurring in the judgment.

> "The right to offer the testimony of witnesses, and to compel their attendance, if necessary, is in plain terms the right to present a defense, the right to present the defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lies." *Washington* v. *Texas*, 388 U. S. 14, 19 (1967).

In short, the right to compulsory process is essential to a fair trial. Today's decision, I fear, may not protect adequately the interests of the prosecution and the defense in a fair trial, and may encourage litigation over whether the defendant has made a "plausible showing that the testimony of the deported witnesses would have been material and favorable to his defense." *Ante*, at 14. A preferable approach would be to accommodate *both* the Government's interest in prompt deportation of illegal aliens *and* the defendant's need to interview alien witnesses in order to decide which of them can provide material evidence for the defense. Through a suitable standard, imposed on the federal courts under our supervisory powers, a practical accommodation can be reached without any increase in litigation.

I

One cannot discount the importance of the Federal Government's role in the regulation of immigration.[1] As the Court points out, Congress and the Immigration and Naturalization Service, the agency authorized to make such policy decisions, have decided that prompt deportation is the appropriate response to the tremendous influx of illegal aliens. *Ante,* at 6. The Court is also correct that the Federal Government has legitimate reasons for reducing the number of illegal aliens detained for possible use as material witnesses. Particularly because most of the detained aliens are never called to testify, we should be careful not to permit either needless human suffering or excessive burdens on the Federal Government. Under these circumstances, courts should be especially circumspect about interfering with congressional judgments.

Nevertheless, the constitutional obligation of the Executive to "take care that the laws be faithfully executed," U. S. Const. Art. II, § 3, including the immigration laws, does not lessen the importance of affording the defendant the "fundamental fairness" inherent in due process, *Lisenba* v. *California,* 314 U. S. 219, 236 (1941). Moreover, the defendant's express right in the Sixth Amendment to compel the testimony of "witnesses in his favor," requires recognition of the importance, both to the individual defendant and to the integrity of the criminal justice system, of permitting the defendant the opportunity to interview eyewitnesses to the alleged crime. A governmental policy of deliberately putting potential defense witnesses beyond the reach of compulsory process is not easily reconciled with the spirit of the Compulsory Process Clause.

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[1] Article I, § 8, cl. 4 states that Congress shall have the power "To establish a uniform Rule of Naturalization." See *Mathews* v. *Diaz,* 426 U. S. 67, 81 (1976) ("For reasons long recognized as valid, the responsibility for regulating the relationship between the United States and our alien visitors has been committed to the political branches of the Federal Government"); *Galvan* v. *Press,* 347 U. S. 522, 531 (1954) ("that the formulation of [immigration] policies is entrusted exclusively to Congress has become about as firmly imbedded in the legislative and judicial tissues of our body politic as any aspect of our government").

II

The Court's solution to this apparent conflict between the Executive's duty to enforce the immigration laws and its duty not to impair the defendant's rights to due process and compulsory process is to permit the Government to deport potential alien witnesses, and to put the burden on the defendant of making a plausible showing that the deported aliens would have provided material and relevant evidence. The Court's approach thus permits the Government to make a practice of deporting alien witnesses immediately, taking only the risk that the defendant will be able to show that the deported witnesses, whom the defendant's counsel never will be able to interview, would have provided useful testimony. In effect, to the extent that the Government has conflicting obligations, the defendant is selected to carry the burden of their resolution.

As the Court poses the issue today, the only alternatives are either to (1) permit routine deportation of witnesses and require the defendant to make some showing of prejudice, or (2) delay deportation so that defense counsel can interview the potential witnesses, and provide for automatic dismissal of the indictment if the witnesses are deported. There is, however, another alternative that would avoid unduly burdening either the Government or the defendant. The Court could require that deportation of potential alien witnesses be delayed for a very brief interval to allow defense counsel, as well as the Government, to interview them. That approach is somewhat similar to the Ninth Circuit's practice, originally described in *United States* v. *Mendez-Rodriguez*, 450 F. 2d 1 (1971). Under the holding in that case, illegal alien witnesses were held in custody for a short period, an average of five days, following the appointment of counsel. During that time, defense counsel had the opportunity to interview the witnesses and determine whether any of them might provide material and relevant evidence. Following the interviews, a federal magistrate held a hearing to determine whether any of the witnesses could provide material evidence, and ordered deportation of those aliens who could not provide such testimony. On those occasions when the Government nevertheless deported potential witnesses before the materiality hearing was held, the District Court determined whether the deported witnesses could have been of some "conceivable benefit" to the defendant. If the defendant met that standard, the court dismissed the indictment.

The principal difficulty with the Ninth Circuit's approach was, as the Court notes, *ante*, at 7–8, that it required virtually no evidence that the deported witness' testimony would have been material to the defense. Under the Ninth Circuit's formulation, the Government's deportation of an alien witness resulted in virtually an automatic dismissal of the indictment.

In adopting a standard requiring brief detention of potential alien witnesses, the Court need not take so extreme a position. In *United States* v. *Avila-Dominguez*, 610 F. 2d 1266 (CA5 1980), for example, the Fifth Circuit followed the Ninth Circuit's rationale in concluding that a defendant's constitutional rights are violated if the Government deports an alien witness before the defendant has had an opportunity to interview him. The court nevertheless affirmed the defendant's conviction because he could not offer a "plausible theory" explaining how the witness' testimony would have been helpful to the defense. *Id.*, at 1270. The court thus adopted a more stringent test than the Ninth Circuit's "conceivable benefit" test.

The standard I propose is an amalgam of the approaches used by the Fifth and Ninth Circuits.[2] As a matter of course, the deportable aliens who are potential witnesses should be detained for a very brief period to afford Government and defense counsel the opportunity to interview them. If, within that period, the defendant requests that certain aliens not be deported, a federal magistrate should hold a hearing to determine whether deportation of any of the witnesses should be deferred until after trial. As evidenced by the statistics provided by the respondent, similar procedures in the Ninth Circuit have produced very little litigation. See Brief for Respondent, at 30. Of course, the Government could be expected to abide by such a rule, but in the occasional event that it deports alien witnesses without affording the defendant any opportunity to interview them, the defendant should not be entitled to an automatic dismissal of the indictment; nor should the defendant be expected to prove prejudice—after all, the Government has deported his potential witnesses. Instead, I agree with the Court that sanctions should be available against the Government if the defendant sets forth some plausible theory explaining how the deported witnesses would have provided material evidence that was not simply cumulative of evidence readily available to the defendant.

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[2] This Court has not hesitated to use its supervisory power over federal courts to set standards to ensure the fair administration of justice. For

III

In the case before us, the respondent made no plausible suggestion that the deported aliens possessed any material

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example in *McCarthy* v. *United States*, 394 U. S. 459, 468–472 (1969), this Court, under its supervisory power, held that when a District Court does not comply fully with Fed. Rule Crim. Proc. 11 in accepting a guilty plea, the plea must be set aside and the case remanded for the defendant to enter a new plea. The Court expressly rejected the rule, adopted by some circuits, of holding a hearing to determine whether the defendant had entered his plea voluntarily with an understanding of the charge. See also *Marshall* v. *United States*, 360 U. S. 310, 313 (1959) (using its "supervisory power to formulate and apply proper standards for enforcement of the criminal law in the federal courts" in setting aside a criminal conviction because several jurors had read inadmissible news accounts of the defendant's past activities).

evidence that was not merely cumulative of other evidence. Under the standard I have proposed, the District Court properly denied the respondent's motion to dismiss the indictment. Accordingly, I concur in the judgment of the Court.

SUPREME COURT OF THE UNITED STATES

No. 81-450

UNITED STATES, PETITIONER *v.* RICARDO VALENZUELA-BERNAL

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

[July 2, 1982]

JUSTICE BRENNAN, with whom JUSTICE MARSHALL joins, dissenting.

Today's holding flaunts a transparent contradiction. On the one hand, the Court recognizes respondent's constitutional right, under the Compulsory Process Clause of the Sixth Amendment, to the production of all witnesses whose testimony would be relevant and material to his defense. *Ante*, at 8–11. But on the other hand, the Court holds that the Government may deport illegal-alien eyewitnesses to respondent's alleged crime immediately upon their apprehension, before respondent or his attorney have had any opportunity to interview them—thus depriving respondent of the surest and most obvious means by which he could establish the materiality and relevance of such witnesses' testimony. *Ante*, at 14. Truly, the Court giveth, and the Court taketh away. But surely a criminal defendant has a constitutional right to interview eyewitnesses to his alleged crime before they are whisked out of the country by his prosecutor. The Court's decision today makes a mockery of that right. Accordingly, I dissent.

The premise of the Court's holding is that "the responsibility of the Executive Branch faithfully to execute the immigration policy adopted by Congress justifies the prompt deportation of illegal-alien witnesses," *ante*, at 14; this governmental power is conditioned only upon the Executive's "good-faith determination" that those witnesses possess "no evidence favorable to the defendant in a criminal prosecution," *ibid.* The Court sets up this asserted "responsibility" of the Executive Branch as a counterweight to its responsibility for "apprehending and obtaining the conviction of those who have violated the criminal statutes of the United States." *Id.*, at 5. Thus the Court presents this case as involving a governmental "dilemma," *id.*, at 7, in which the Executive Branch is caught between the conflicting demands of its "dual responsibility," *id.*, at 5. This supposed "dilemma" is a pure figment of the Court's imagination, repudiated by our precedents and by common sense.

The Executive Branch has many responsibilities, any of which may conflict with its duty to enforce the federal criminal law. For example, the Executive Branch has an obvious and imperative obligation to preserve the national security. But when the Executive Branch chooses to prosecute a violation of federal law, it incurs a constitutional responsibility manifestly superior to its other duties: namely, the responsibility to ensure that the accused receives the due process of law. The Government simply cannot be heard to argue that the criminal defendant's rights may be infringed because of the Executive Branch's "other responsibilities": Given the vast and manifold character of those responsibilities, to accept such an argument would be to accede to the rapid evisceration of the constitutional rights of the accused.

This point is hardly a novel one. In *Jencks* v. *United States*, 353 U. S. 657 (1957), we noted that "the protection of vital national interests may militate against public disclosure of documents in the Government's possession." *Id.*, at 670. But at the same time we noticed that

> "in criminal causes, '. . . the Government can invoke its evidentiary privileges only at the price of letting the defendant go free. The rationale of the criminal cases is that, since the Government which prosecutes the ac-

> cused also has the duty to see that justice is done, it is unconscionable to allow it to undertake prosecution and then invoke its governmental privileges to deprive the accused of anything which might be material to his defense. . . . '" *Id.*, at 671, quoting *United States* v. *Reynolds*, 345 U. S. 1, 12 (1953).

We also quoted with approval from the opinion of the Court of Appeals for the Second Circuit in *United States* v. *Andolscheck*, 142 F. 2d 503 (1944), in which Judge Learned Hand said:

> ". . . While we must accept it as lawful for a department of the government to suppress documents, even when they will help determine controversies between third persons, we cannot agree that this should include their suppression in a criminal prosecution, founded upon those very dealings to which the documents relate, and whose criminality they will, or may, tend to exculpate. So far as they directly touch the criminal dealings, the prosecution necessarily ends any confidential character the documents may possess; it must be conducted in the open, and will lay bare their subject matter. The government must choose; either it must leave the transactions in the obscurity from which a trial will draw them, or it must expose them fully." 142 F. 2d, at 506.[1]

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[1] See *United States* v. *Beekman*, 155 F. 2d 580, 583-584 (CA2 1946). See also *United States* v. *Burr*, 25 F. Cas. 187, 191 (1807) ("If this might be likened to a civil case, the law is express on the subject. It is that either party may require the other to produce books or writings in their possession or power, which contain evidence pertinent to the issue. . . . [I]f the order be disobeyed by the plaintiff, judgment as in the case of a nonsuit may be entered against him."); *United States* v. *Nixon*, 418 U. S. 683, 709 (1974) ("To ensure that justice is done, it is imperative to the function of courts that compulsory process be available for the production of evidence needed either by the prosecution or the defense.").

The principle affirmed in these precedents is directly applicable to this case. Of course the Government has a responsibility to execute our national immigration policy. But that responsibility does not conflict in the smallest degree with the Government's "duty to see that justice is done" to the criminal defendant whom it has chosen to prosecute. If the Government wishes to pursue criminal remedies against the accused, then its other "responsibilities" must yield before the rights to which an accused is constitutionally entitled.

Of course, the Government's duty to enforce the immigration laws should not be deferred indefinitely. But no inordinate delay is necessary in cases such as the one before us. The Southern District of California long ago adopted a procedure to enforce the *Mendez-Rodriguez* doctrine announced by the Court of Appeals for the Ninth Circuit in 1971.[2] The Southern District's procedure represents a practical and sensitive accommodation between a criminal defendant's constitutional rights under the Compulsory Process Clause and the Government's policy of prompt deportation of illegal aliens. Under that procedure, illegal-alien eyewitnesses are held in custody for a short period of time—about ten days—after appointment of counsel for the criminal defendant. At the end of that period, the United States magistrate holds a material witness bail review hearing, pursuant to 18 U. S. C. § 3149. In the intervening time, counsel for the defendant may interviews the witnesses, and determine whether they can provide testimony material to the defense. At the hearing, both prosecution and defense are required to show the materiality of each of the detained witnesses, or they are released and deported. Brief of the Respondent 6–7; Brief for the United States 13–14, 18. If this traditional Southern District procedure had been adhered to in the present case, the Government would have clearly discharged its constitutional obligation to afford respondent an opportunity to develop evidence bearing upon the materiality of the testimony of the witnesses to his alleged offense. In contrast, the Court permits the Government to adopt a wholly unilateral procedure that deprives respondent and future criminal defendants of any such opportunity.

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[2] See *United States* v. *Mendez-Rodriguez*, 450 F. 2d 1 (CA9 1971).

The Court suggests that a criminal defendant should be able to "demonstrate either the presence or absence of the required materiality" even without having had an opportunity to interview the detained eyewitnesses. *Ante*, at 12. But this notion has been flatly rejected by our precedents. *Roviaro* v. *United States*, 353 U. S. 53 (1957), denied the Government's claimed privilege to withhold the identity of its informer, "John Doe," from the petitioner.[3] Roviaro, like respondent in the present case, was "present throughout the commission of this crime." *Ante*, at 12; see 353 U. S., at 64 ("So far as [Roviaro] knew, he and John Doe were alone and unobserved during the crucial occurrence for which he was indicted."). But the Court in *Roviaro* refused to say, as the Court does today, that a criminal defendant "can establish no Sixth Amendment violation without making some plausible explanation of the assistance he would have received from the testimony" that he seeks. *Ante*, at 13. Rather, the Court in *Roviaro* required disclosure simply because John Doe's testimony "*might* have been helpful to the defense." 353 U. S., at 63-64.

> "Doe had helped to set up the criminal occurrence and had played a prominent part in it. His testimony might have disclosed an entrapment. He might have thrown doubt upon petitioner's identity or the identity of the package [of heroin]. He was the only witness who

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[3] *Roviaro* represented an exercise of our supervisory jurisdiction. See *McCray* v. *Illinois*, 386 U. S. 300, 309 (1967). But as the Court concedes, *ante*, at 11, *Roviaro* would not have been decided differently if the Due Process and Confrontation Clause claims implicit in that case had been brought to the fore.

> might have testified to petitioner's possible lack of knowledge of the contents of the package that he 'transported' . . . to John Doe's car. The desirability of calling John Doe as a witness, *or at least interviewing him in preparation for trial, was a matter for the accused rather than the Government to decide.*" *Id.*, at 64 (emphasis added).

Like Doe in *Roviaro*, the illegal aliens deported by the Government in the present case "played a prominent part" in respondent's alleged offense—if, indeed, they did not help to set it up without the knowledge of respondent. And they, like Doe, might have testified to respondent's "possible lack of knowledge" respecting essential elements of the crime charged against him.[4] Under *Roviaro, respondent*, not the Government, was entitled to decide whether or not the illegal-alien eyewitnesses in this case could give testimony material and relevant to the defense.

I dissent.

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[4] In order to obtain a conviction under 8 U. S. C. § 1324(a)(2), quoted *ante*, at 1, n. 1, the Government was required to show (1) that respondent transported an alien within the United States, (2) that the alien had not been lawfully admitted or was not lawfully entitled to enter, (3) that this was known to respondent, (4) that respondent knew that the alien's last entry was within three years, and (5) that respondent acted willfully in furtherance of the alien's violation of the law. *United States* v. *Gonzalez-Hernandez*, 534 F. 2d 1353, 1354 (CA9 1976). Since the third and fourth elements of this statutory requirement bear upon respondent's state of mind, it is plain that the illegal aliens whom respondent was transporting might very well have been able to testify to his lack of knowledge on these critical points.

READEX FICHE

All issues available have been filmed.
Unfortunately, any scattered missing issues are no longer available.

981/81-451

(Slip Opinion)

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Lumber Co.*, 200 U. S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

HATHORN ET AL. *v.* LOVORN ET AL.

CERTIORARI TO THE SUPREME COURT OF MISSISSIPPI

No. 81-451. Argued April 27, 1982—Decided June 15, 1982

A 1964 Mississippi statute provides that boards of trustees of municipal separate school districts in the State shall consist of five members, and that in any county in which a district embraces the entire county "in which Highways 14 and 15 intersect," one trustee shall be elected from each supervisors district. The Louisville School District (District) is coextensive with Winston County, Miss., and is the only county in which Highways 14 and 15 intersect. Since 1960, the Louisville mayor and city aldermen appointed three of the five members of the District's Board of Trustees, and Winston County voters residing outside Louisville elected the other two members. The county officials never implemented the 1964 statute. Respondent Winston County voters filed an action against petitioner local officials in Mississippi Chancery Court seeking to enforce the 1964 statute. The court dismissed the complaint on the ground that the statute violated the state constitutional bar against local legislation. The Mississippi Supreme Court reversed and remanded, striking only the statute's reference to Highways 14 and 15 and upholding the remainder of the statute. The Supreme Court without comment denied petitioners' petition for rehearing in which they argued for the first time that the Chancery Court could not implement the reformed statute until the change had been precleared under § 5 of the Voting Rights Act of 1965. On remand, the Chancery Court ordered an election pursuant to the redacted statute under procedures prescribed by the court, but directed petitioners to submit the election plan to the United States Attorney General for preclearance under § 5 of the Voting Rights Act. The Attorney General subsequently objected to the plan, and the Chancery Court ultimately concluded that its order would remain in force subject to compliance with the Voting Rights Act. Respondents once again appealed to the Supreme Court, which held that its prior decision was the law of the case and that the Chancery Court im-

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properly conditioned the election on compliance with the Voting Rights Act.

Held:

1. The Mississippi Supreme Court's decision did not rest on independent and adequate state grounds so as to bar this Court's review of the federal issue. Where the state court's first decision did not appear final when rendered, the court's subsequent reliance on the law of the case does not prevent this Court from reviewing federal questions determined in the first appeal. Nor does the fact that petitioners' reliance upon the Voting Rights Act issue for the first time in their petition for rehearing may have been untimely under a Mississippi procedural rule constitute an independent and adequate state ground barring this Court's review of the federal question, where it appears that, if Mississippi still follows such a rule, it does not do so "strictly or regularly." Pp. 6–10.

2. The Mississippi courts had the power to decide whether § 5 of the Voting Rights Act applied to the change in election procedures sought by respondents, and must withhold further implementation of the disputed change until the parties demonstrate compliance with § 5. Both the language and purposes of the Act refute the notion that a state court asked to implement a change in the State's voting laws cannot inquire whether the change is subject to § 5 but must ignore that circumstance and enter a decree violating federal law. Section 14(b) of the Act, which provides that no court other than the District Court for the District of Columbia shall have jurisdiction to enter a declaratory judgment pursuant to § 5 governs only declaratory judgments approving proposed voting procedure changes. And nothing in the provisions of § 5, requiring an action under that section to be heard by a three-judge federal district court, or in the provisions of § 12(f) of the Act, giving federal district courts jurisdiction of proceedings under that section, negates the presumption that, at least when the issue arises collaterally, state courts have the power to decide whether a proposed change in election procedures requires preclearance under § 5. Granting state courts such power helps to ensure compliance with the preclearance scheme. Pp. 10–15.

399 So. 2d 1356, reversed and remanded.

O'CONNOR, J., delivered the opinion of the Court, in which BURGER, C. J., and BRENNAN, WHITE, MARSHALL, BLACKMUN, and STEVENS, JJ., joined. POWELL, J., concurred in the judgment. REHNQUIST, J., filed a dissenting opinion.

NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D.C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

SUPREME COURT OF THE UNITED STATES

No. 81-451

RALPH HATHORN, ET AL., PETITIONERS *v.* MRS. BOBBY LOVORN, ET AL.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSISSIPPI

[June 15, 1982]

JUSTICE O'CONNOR delivered the opinion of the Court.

We granted certiorari to decide whether a state court may order implementation of a change in election procedure over objections that the change is subject to preclearance under §5 of the Voting Rights Act of 1965.[1]

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[1] Section 5 provides in relevant part:

"Whenever a [covered] State or political subdivision . . . shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1964, . . . such State or subdivision may institute an action in the United States District Court for the District of Columbia for a declaratory judgment that such qualification, prerequisite, standard, practice, or procedure does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color, or in contravention of the guarantees set forth in section 1973b(f)(2) of this title, and unless and until the court enters such judgment no person shall be denied the right to vote for failure to comply with such qualification, prerequisite, standard, practice, or procedure: *Provided*, That such qualification, prerequisite, standard, practice, or procedure may be enforced without such proceeding if the qualification, prerequisite, standard, practice, or procedure has been submitted by the chief legal officer or other appropriate official of such State or subdivision to the Attorney General and the Attorney General has not interposed an objection within sixty days after such submission, or upon good cause shown, to facilitate an expedited approval within sixty days after such submission, the Attorney General has affirmatively indicated that such objection will not

I

Since 1960, the Louisville School District has been coextensive with Winston County, Mississippi. Until last December, the Louisville mayor and city aldermen appointed three of the five members of the District's Board of Trustees, and Winston County voters residing outside Louisville elected the other two members.

In 1964, the Mississippi legislature enacted a statute providing in part:

> "The boards of trustees of all municipal separate school districts, either with or without added territory, shall consist of five (5) members, each to be chosen for a term of five (5) years, but so chosen that the term of office of one (1) member shall expire each year. . . . [I]n any county in which a municipal separate school district embraces the entire county in which Highways 14 and 15 intersect, one (1) trustee shall be elected from each supervisors district." 1964 Miss. Gen. Laws 563, codified as amended in Miss. Code Ann. § 37-7-203(1) (Supp. 1981).

Winston County is the only Mississippi county in which Highways 14 and 15 intersect. Officials in that county never implemented § 37-7-203(1) because they believed the statute's reference to Highways 14 and 15 violated a state constitutional prohibition against local, private, or special legislation.[2]

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be made. . . ." 79 Stat. 439, as amended, 42 U. S. C. § 1973c. Section 4 of the Act, 79 Stat. 438, as amended, 42 U. S. C. § 1973b, defines covered jurisdictions.

[2] Miss. Const. Art. 4, § 90 provides:

"The legislature shall not pass local, private, or special laws in any of the following enumerated cases, but such matters shall be provided for only by general laws, viz.

. . . . .

"(p) Providing for the management or support of any private or common

In 1975, five Winston County voters filed an action in the Chancery Court of Winston County,[3] seeking to enforce the neglected 1964 state statute.[4] These plaintiffs, respondents here, named numerous Louisville and Winston County officials as defendants. The Chancery Court dismissed respondents' complaint, holding that the statute violated Mississippi's constitutional bar against local legislation. The Mississippi Supreme Court reversed, striking only the specific reference to Highways 14 and 15 and upholding the remaining requirement that, "in any county in which a municipal separate school district embraces the entire county," each supervisors district must elect one trustee. 365 So. 2d 947 (1979) (en banc). The court then "remanded to the chancery court for further proceedings not inconsistent with [its] opinion." *Id.*, at 952.

The local officials, petitioners here, filed a petition for rehearing, in which they argued for the first time that the Chancery Court could not implement the reformed statute until the change had been precleared under § 5 of the Voting Rights Act. The Mississippi Supreme Court denied the petition without comment, and this Court denied a petition for a writ of certiorari. 441 U. S. 946 (1979).

On remand, the Chancery Court ordered an election pursuant to the redacted statute. The court set out detailed procedures governing the election, including the requirement

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school, incorporating the same, or granting such school any privileges. . . ."

[3] The voters initially filed their suit in the United States District Court for the Northern District of Mississippi. That court stayed federal proceedings to give the Mississippi courts an opportunity to construe the state statute at issue. Record 320. In 1979, pursuant to a notice of voluntary dismissal by stipulation, the court dismissed the federal action without prejudice. Record 323.

[4] The voters also charged that the electoral system then in force violated the constitutional principle of one person/one vote. This issue is not before us.

that "[i]f no candidate receives a majority of the vote cast at any of said elections . . . , a runoff election shall be held . . . between the two candidates receiving the highest vote [in the first election.]" Record 143. The court derived the latter requirement from Miss. Code Ann. § 37-7-217 (Supp. 1981), which mandates runoffs in elections conducted under § 37-7-203(1). See Miss. Code Ann. § 37-7-209 (Supp. 1981). The Chancery Court also agreed with petitioners' claim that the changes in election procedure fell within § 5 of the Voting Rights Act, and directed petitioners to submit the election plan to the United States Attorney General for preclearance. Record 141, 146-147.[5]

Upon review of petitioners' submission, the Attorney General objected to the proposed change in election procedure "insofar as it incorporate[d] a majority vote requirement." App. to Pet. for Cert. A-8. Because of the substantial black population in Winston County,[6] an apparent pattern of racially polarized voting in the county, and the historical absence of blacks from various local governing boards, the Attorney General concluded that the runoff procedure could have a discriminatory effect. *Ibid.*[7]

Respondents attempted to overcome this obstacle by both joining the Attorney General as a defendant and persuading the Chancery Court to hold the election without the runoff procedure. The court, however, refused to join the Attorney General and held that state law unambiguously required runoff elections. Buffeted by apparently conflicting state and federal statutes, the Chancery Court concluded that its decree calling for an election would "remain in force subject to compliance with the Federal Voters Right Act [*sic*] as previously ordered by this Court." Record 342.

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[5] As we have explained on numerous occasions, covered jurisdictions may satisfy § 5 by submitting proposed changes to the Attorney General. If the Attorney General objects to the proposal, the jurisdiction may either request reconsideration or seek a declaratory judgment from the United States District Court for the District of Columbia. A covered jurisdiction, of course, also may seek a declaratory judgment in the first instance, omitting submission to the Attorney General. See generally *Blanding* v. *DuBose*, 454 U. S. —— (1982); *Allen* v. *State Board of Elections*, 393 U. S. 544, 548-550 (1969).

[6] At that time, the Attorney General noted, blacks constituted approximately 39% of the Winston County population but were not a majority in any of the districts from which trustees were to be elected.

[7] The Attorney General also observed that the Winston County school district appears to be the only county-wide district in which Mississippi requires runoff elections.

Failing to obtain an election from the Chancery Court, respondents once again appealed to the Mississippi Supreme Court. That court observed that its "prior decision, which the United States Supreme Court declined to reverse or alter in any respect, became and is the law of the case." *Carter* v. *Luke*, 399 So. 2d 1356, 1358 (1981). The court explained that because the prior decision upheld a statute referring to the statute requiring runoffs, and because both parties had agreed during oral argument to abide by the runoff procedure, the Chancery Court properly enforced the law requiring runoffs and improperly conditioned the election on compliance with the Voting Rights Act. Accordingly, the Mississippi Supreme Court reversed the portion of the Chancery Court's decree referring to the Voting Rights Act and "remanded with directions for the lower court to call and require the holding of an election." 399 So. 2d, at 1358. We granted certiorari to decide whether the Mississippi Supreme Court properly ordered the election without insuring compliance with federal law. 454 U. S. —— (1981).[8]

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[8] Shortly before petitioners filed their petition for certiorari, the Chancery Court set an election for December 5, 1981. That court, the Mississippi Supreme Court, and this Court denied motions to stay the election. See 454 U. S. 1070 (1981). On December 1, the United States filed suit in the United States District Court for the Northern District of Mississippi, seeking to enjoin implementation of the voting change involved in this case. The District Court refused to issue a temporary restraining order and has not taken any other action.

The December 5 election was held as scheduled. Although the record does not reflect the results of the election, the United States has informed

II

Before addressing the federal question raised by the Mississippi Supreme Court's decision, we must consider respondents' assertion that the lower court decision rests upon two adequate and independent state grounds. First, respondents contend that the state court's reliance upon the law of the case bars review of the federal question. It has long been established, however, that "[w]e have jurisdiction to consider all of the substantial federal questions determined in the earlier stages of [state proceedings], . . . and our right to re-examine such questions is not affected by a ruling that the first decision of the state court became the law of the case. . . ." *Reece* v. *Georgia*, 350 U. S. 85, 87 (1955). See also *Davis* v. *O'Hara*, 266 U. S. 314, 321 (1924); *United States* v. *Denver & Rio Grande R. Co.*, 191 U. S. 84, 93 (1903). Because we cannot review a state court judgment until it is final,[9] a contrary rule would insulate interlocutory state court rulings on important federal questions from our consideration.

In this case the Mississippi Supreme Court's first decision plainly did not appear final at the time it was rendered. The court's remand "for further proceedings not inconsistent with [its] opinion," 365 So. 2d 947, 952 (1979) (en banc), together with its failure to address expressly the Voting Rights Act issue, suggested that the Chancery Court could still consider the federal issue on remand. Indeed, the Chancery Court interpreted its mandate in precisely this manner.[10] Under

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us that a runoff election was held in at least one district. Brief for the United States as Amicus Curiae 10, n. 12; Tr. of Oral Arg. 22.

[9] 28 U. S. C. § 1257; *O'Dell* v. *Espinoza*, 456 U. S. —— (1982); *Market Street R. Co.* v. *Railroad Commission of California*, 324 U. S. 548, 551 (1945).

[10] The Chancellor, in fact, noted that it "would have been impossible to have submitted to the Attorney General for approval until this Court had set up the mechanics of the election, for until that was done, the Attorney

these circumstances, the Mississippi Supreme Court's subsequent reliance on the law of the case cannot prevent us from reviewing federal questions determined in the first appeal.[11]

Respondents also argue that the Mississippi Supreme Court pretermitted consideration of the Voting Rights Act because petitioners' reliance upon the issue in a petition for rehearing was untimely. We have recognized that the failure to comply with a state procedural rule may constitute an independent and adequate state ground barring our review of a federal question.[12] Our decisions, however, stress that a state procedural ground is not "adequate" unless the procedural rule is "strictly or regularly followed." *Barr* v. *City of Columbia*, 378 U. S. 146, 149 (1964). State courts may not avoid deciding federal issues by invoking procedural rules that they do not apply evenhandedly to all similar claims. Even if we construe the Mississippi Supreme Court's denial of petitioners' petition for rehearing as the silent application of a procedural bar, we cannot conclude that the state court consistently relies upon this rule.

Respondents cite two cases indicating that the Mississippi Supreme Court will consider an issue raised for the first time in a petition for rehearing "[o]nly in exceptional cases." *New & Hughes Drilling Co.* v. *Smith*, 219 So. 2d 657, 661 (Miss. 1969); *Rigdon* v. *General Box Co.*, 249 Miss. 239, 246, 162 So. 2d 863, 864 (1964). Although these opinions may summarize the court's practice prior to 1969, we have been unable to find

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General would not have the data necessary to either approve or disapprove." Record 90–91.

[11] Nor, of course, does our previous denial of petitioners' petition for a writ of certiorari preclude us from examining questions decided during the first state appeal. It is "well-settled . . . that denial of certiorari imparts no implication or inference concerning the Court's view of the merits." *Hughes Tool Co.* v. *Trans World Airlines, Inc.*, 409 U. S. 363, 366, n. 1 (1973).

[12] *E. g., Michigan* v. *Tyler*, 436 U. S. 499, 512 n. 7 (1978); *New York Times Co.* v. *Sullivan*, 376 U. S. 254, 264, n. 4 (1964).

any more recent decisions repeating or applying the rule.[13] On the contrary, the Mississippi Supreme Court now regularly grants petitions for rehearing without mentioning any restrictions on its authority to consider issues raised for the first time in the petitions.[14]

One particular decision by the Mississippi Supreme Court, decided only last year, demonstrates that the court does not consistently preclude consideration of issues raised for the first time on rehearing. In *Quinn* v. *Branning*, 404 So. 2d 1018 (1981), the court held that part of a criminal statute violated the state constitution's prohibition against local legislation. Striking the offensive language, the court approved the rest of the statute and affirmed the underlying conviction. The defendant then petitioned for rehearing, pointing out that the affidavit against him did not allege a crime under the reformed statute. The court agreed with this contention, granted the petition in part, and reversed the conviction, all without mentioning the rule against consideration of new issues on rehearing. The striking similarity between *Quinn* and this case, both involving issues that the parties could have foreseen but that arose with urgency only after the court upheld part of a challenged statute, persuades us that the Mississippi Supreme Court is not "strictly or regularly" following a procedural rule precluding review of issues raised for the first time in a petition for rehearing. The denial of rehearing in this case, although not appearing sufficiently final to permit our immediate review, must have rested either upon a substantive rejection of petitioners' federal claim or upon a procedural rule that the state court applies only irregularly.[15] Thus, there are no independent and adequate state grounds barring our review of the federal issue.

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[13] In *New & Hughes Drilling Co.* itself, the Mississippi Supreme Court permitted an exception to the alleged rule barring review of questions raised for the first time on rehearing. A case decided the same year as *New & Hughes Drilling Co.* is the most recent decision we have found that might have actually applied the procedural rule described by respondents. See *Leake County Cooperative* v. *Dependents of Barrett*, 226 So. 2d 608, 614–616 (Miss. 1969). Even that decision, however, may have rested upon a special rule involving waiver of defects in venue.

Neither the Mississippi Code nor the Rules of the Supreme Court of Mississippi embody the alleged prohibition against presentation of new issues in petitions for rehearing. Under these circumstances, it is difficult to know whether the Mississippi Supreme Court still adheres to the rule, applying it silently, or whether the court has abandoned the rule.

[14] See, *e. g.*, *Cortez* v. *Brown*, 408 So. 2d 464 (Miss. 1981) (en banc); *Cash* v. *Illinois Central Gulf R. Co.*, 388 So. 2d 871 (Miss. 1980) (en banc); *McKee* v. *McKee*, 382 So. 2d 287 (Miss. 1980) (en banc); *City of Jackson* v. *Capital Reporter Publishing Co.*, 373 So. 2d 802 (Miss. 1979) (en banc); *Realty Title Guaranty Co.* v. *Howard*, 355 So. 2d 657 (Miss. 1978) (en banc); *Couch* v. *Martinez*, 357 So. 2d 107 (Miss. 1978) (en banc); *Foster* v. *Foster*, 344 So. 2d 460 (Miss. 1977) (en banc); *McCrory* v. *State*, 342 So. 2d 897 (Miss. 1977) (en banc); *Daniels* v. *State*, 341 So. 2d 918 (Miss. 1977) (en banc); *Mississippi State Highway Commission* v. *Gresham*, 323 So. 2d 100, 103 (Miss. 1975) (en banc); *Powers* v. *Malley*, 302 So. 2d 262, 264 (Miss. 1974).

In *Mississippi State Highway Commission* v. *Gresham*, *supra*, the court expressly noted that its disposition depended upon a fact mentioned for the first time in the petition for rehearing. In several other decisions, the type of question considered on rehearing suggests that it was raised for the first time by the party petitioning for that relief. *E. g.*, *Cortez* v. *Brown*, *supra*; *City of Jackson* v. *Capital Reporter Publishing Co.*, *supra*; *Powers* v. *Malley*, *supra*. These decisions, however, do not expressly acknowledge the novelty of the points raised on rehearing.

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[15] Respondents also contend that our decisions establish a general rule against review of questions presented for the first time in a petition for rehearing. We have recognized that, under many circumstances, "[q]uestions first presented to the highest State court on a petition for rehearing come too late for consideration here." *Radio Station WOW, Inc.* v. *Johnson*, 326 U. S. 120, 128 (1945). At the same time, however, we have explained that this bar does not apply if "the State court exerted its jurisdiction in such a way that the case could have been brought here had the questions been raised prior to the original disposition." *Ibid.* In this case we conclude that the Mississippi Supreme Court's first judgment on appeal either decided the federal question on the merits, although in a manner that did not appear final, or avoided the federal question by invoking an inconsistently applied procedural rule. If petitioners had made their claim prior to the court's original disposition, either of these circumstances would

III

Respondents do not dispute that the change in election procedures ordered by the Mississippi courts is subject to preclearance under § 5.[16] They urge, however, that the Voting Rights Act deprives state courts of the power even to decide whether § 5 applies to a proposed change in voting proce-

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have permitted us to review the federal question.

[16] Mississippi plainly is one of the jurisdictions covered by the statute. *South Carolina* v. *Katzenbach*, 383 U. S. 301, 318 (1966); 30 Fed. Reg. 9897 (1965). The Louisville School District Board of Trustees, like all political entities within the State, accordingly must comply with § 5's strictures. See *Dougherty County Board of Education* v. *White*, 439 U. S. 32, 46 (1978); *United States* v. *Board of Commissioners of Sheffield*, 435 U. S. 110 (1978). It is immaterial that the change sought by respondents derives from a statute that predates the Voting Rights Act, because § 5 comes into play whenever a covered jurisdiction departs from an election procedure that was "*in fact* 'in force or effect' . . . on November 1, 1964." *Perkins* v. *Matthews*, 400 U. S. 379, 395 (1971) (emphasis original).

Finally, the presence of a court decree does not exempt the contested change from § 5. We held only last Term that § 5 applies to any change "reflecting the policy choices of the elected representatives of the people," even if a judicial decree constrains those choices. *McDaniel* v. *Sanchez*, 452 U. S. 130, 153 (1981). Although *McDaniel* involved a reapportionment plan drafted pursuant to a federal court's order, its interpretation of § 5 is equally instructive here. When state or local officials comply with a court order to enforce a state statute, there is no doubt that their actions "reflec[t] the policy choices of . . . elected representatives." Indeed, if § 5 did not encompass this situation, covered jurisdictions easily could evade the statute by declining to implement new state statutes until ordered to do so by state courts. Cf. *McDaniel* v. *Sanchez*, *supra*, at 151 (noting that "if covered jurisdictions could avoid the normal preclearance procedure by awaiting litigation challenging a refusal to redistrict after a census is completed, [§ 5] might have the unintended effect of actually encouraging delay in making obviously needed changes in district boundaries"). In light of *McDaniel*, we conclude that a state court decree directing compliance with a state election statute contemplates "administ[ration]" of the state statute within the meaning of § 5.

dures.[17] Under their analysis of the Act, a state court asked to implement a change in the State's voting laws could not inquire whether the change was subject to § 5. Even if the change plainly fell within § 5, the court would have to ignore that circumstance and enter a decree violating federal law. Both the language and purposes of the Voting Rights Act refute this notion.

Only last Term we summarized the principles governing state court jurisdiction to decide federal issues. *Gulf Offshore Co.* v. *Mobil Oil Corp.*, 453 U. S. 473 (1981). We begin, in every case, "with the presumption that state courts enjoy concurrent jurisdiction" over those claims. *Id.*, at 478. Only "an explicit statutory directive, [an] unmistakable implication from legislative history, or . . . a clear incompatibility between state-court jurisdiction and federal interests" will rebut the presumption. *Ibid.* Most important for our purposes, even a finding of exclusive federal jurisdiction over claims arising under a federal statute usually "will not prevent a state court from deciding a federal question collaterally." *Id.*, at 483 n. 12.[18]

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[17] Respondents do not claim that Mississippi law restricts its courts' power to decide questions related to § 5.

[18] We frequently permit state courts to decide "collaterally" issues that would be reserved for the federal courts if the cause of action arose directly under federal law. For example, the state courts may decide a variety of questions involving the federal patent laws. *American Well Works Co.* v. *Layne & Bowler Co.*, 241 U. S. 257 (1916); *New Marshall Engine Co.* v. *Marshall Engine Co.*, 223 U. S. 473 (1912); *Pratt* v. *Paris Gas Light & Coke Co.*, 168 U. S. 255 (1897). Similarly, although state courts lack jurisdiction to entertain suits brought pursuant to § 4 of the Clayton Act, 15 U. S. C. § 15, they often decide issues concerning the federal antitrust laws in other contexts. See, *e. g.*, *California Retail Liquor Dealers Association* v. *Midcal Aluminum, Inc.*, 445 U. S. 97 (1980); *Bement* v. *National Harrow Co.*, 186 U. S. 70 (1902), quoted with approval in *Kaiser Steel Corp.* v. *Mullins*, 455 U. S. ——, ——, n. 7 (1982). See generally Note, *Exclusive Jurisdiction of the Federal Courts in Private Civil Actions*, 70 Harv. L. Rev. 509, 510-511 (1957).

Respondents rest their jurisdictional argument on three sections of the Act. Section 14(b) provides that "[n]o court other than the District Court for the District of Columbia . . . shall have jurisdiction to issue any declaratory judgment pursuant to . . . section 5. . . ." 79 Stat. 445, 42 U. S. C. § 1973*l*(b). We have already held, however, that this provision governs only declaratory judgments approving proposed changes in voting procedure. Other courts may decide the distinct question of whether a proposed change is subject to the Act. See *Allen* v. *State Board of Elections*, 393 U. S. 544, 557–560 (1969); *McDaniel* v. *Sanchez*, 452 U. S. 130 (1981).

Sections 5 and 12(f) of the Act provide somewhat stronger support for respondents' claim. Section 5 provides that "[a]ny action under this section shall be heard and determined by a court of three judges in accordance with the provisions of section 2284 of title 28 of the United States Code," 79 Stat. 439, 42 U. S. C. § 1973c, while § 12(f) declares that "[t]he district courts of the United States shall have jurisdiction of proceedings instituted pursuant to this section." 79 Stat. 444, 42 U. S. C. § 1973j(f).[19] It is possible that these sections grant the federal courts exclusive jurisdiction over "action[s] under" § 5 or "proceedings instituted pursuant" to § 12.[20] We need not resolve that question in this case, however, because respondents' state suit fell within neither of these categories. Instead, respondents' initial suit was an action to compel compliance with a forgotten state law.[21] Nothing in § 5 or § 12 negates the presumption that, at least when the issue arises collaterally, state courts may decide whether a proposed change in election procedure requires preclearance under § 5.

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[19] Section 12 authorizes preventive relief against persons "engaged or . . . about to engage in any act or practice prohibited by" designated sections of the Voting Rights Act. 79 Stat. 444, 42 U. S. C. § 1973j(d).

[20] At least one state court has ruled that it lacks jurisdiction over claims arising under the Voting Rights Act. *Ortiz* v. *Thompson*, 604 S. W. 2d 443 (Tex. Ct. Civ. App. 1980). See also *Beatty* v. *Esposito*, 411 F. Supp. 107 (EDNY 1976) (finding that state court lacked jurisdiction to decide § 5 issue, without explaining whether state suit arose under the Voting Rights Act).

The policies of the Act support the same result.[22] The Voting Rights Act "implemented Congress' firm intention to rid the country of racial discrimination in voting." *Allen* v. *State Board of Elections*, 393 U. S. 544, 548 (1969). Fearing that covered jurisdictions would exercise their ingenuity to devise new and subtle forms of discrimination, Congress prohibited those jurisdictions from implementing any change in voting procedure without obtaining preclearance under § 5. Granting state courts the power to decide, as a collateral matter, whether § 5 applies to contemplated changes in election procedures will help insure compliance with the preclearance scheme.[23] Approval of this limited jurisdiction

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[21] Respondents also based their suit on the Fourteenth Amendment. See n. 4, *supra*.

[22] Neither the parties nor the United States, appearing as amicus curiae, has cited any legislative history bearing upon state court jurisdiction to decide issues arising under the Voting Rights Act.

[23] As respondents point out, state court jurisdiction to decide these collateral issues is not absolutely necessary to effectuate the Act's scheme, because interested parties have the ability to seek relief from a federal district court. Recognition of a limited state power to address § 5 issues, however, furthers the Act's ameliorative purposes by permitting additional tribunals to enforce its commands. It also ensures that the question of coverage will be addressed at the earliest possible time, without requiring duplicative lawsuits.

We find little force in respondents' claim that, if the state courts possess jurisdiction to decide § 5 issues arising in disputes between private parties, they will frustrate the Attorney General's enforcement of the Act by interpreting the preclearance requirement conservatively. The Attorney General is not bound by the resolution of § 5 issues in cases to which he was not a party. *City of Richmond* v. *United States*, 422 U. S. 358, 373–374, n. 6 (1975). Common notions of collateral estoppel suggest that the state proceedings similarly would not bind other interested persons who did not par-also avoids placing state courts in the uncomfortable position of ordering voting changes that they suspect, but cannot determine, should be precleared under § 5. Accordingly, we hold that the Mississippi courts had the power to decide whether § 5 applied to the change sought by respondents.

If the Mississippi courts had the power to make this determination, then it is clear that they also had the duty to do so. "State courts, like federal courts, have a constitutional obligation . . . to uphold federal law." *Stone* v. *Powell*, 428 U. S. 465, 494, n. 35 (1976) (citing *Martin* v. *Hunter's Lessee*, 1 Wheat. 304, 341–344 (1816)). Section 5 declares that whenever a covered jurisdiction shall "enact or seek to administer any . . . standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1964," see n. 1, *supra*, it must obtain either preclearance from the Attorney General or a declaratory judgment from the United States District Court for the District of Columbia. Our opinions repeatedly note that failure to follow either of these routes renders the change unenforceable. See, *e. g.*, *Dougherty County Board of Education* v. *White*, 439 U. S. 32, 46 (1978); *United States* v. *Board of Supervisors*, 429 U. S. 642, 645 (1977) (per curiam). When a party to a state proceeding asserts that § 5 renders the contemplated relief unenforceable, therefore, the state court must examine the claim and refrain from ordering relief that would violate federal law.[24]

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ticipate in them. See Restatement (Second) of Judgments § 68 (Tent. Draft No. 4, Apr. 15, 1977). Persons dissatisfied with a state court's collateral resolution of a § 5 issue in proceedings involving other parties, therefore, are likely to be able to litigate the issue anew in federal court.

[24] Our holding does not prevent state courts from attempting to accomodate both state and federal interests. A state court, for example, might adopt the approach followed by the Chancery Court in this case, and order the parties to submit the proposed relief to the Attorney General. If the Attorney General registers an objection, the court might then order the parties to seek a declaratory judgment from the District Court for the

IV

Our holding mandates reversal of the lower court judgment. Under our analysis, the change in election procedure is subject to § 5, see n. 16, *supra*, and the Mississippi courts may not further implement that change until the parties comply with § 5. At this time, however, we need not decide whether petitioners are entitled to any additional relief. The United States has initiated a federal suit challenging the change at issue here, see n. 8, *supra*, and we agree with the Solicitor General that the District Court entertaining that suit should address the problem of relief in the first instance. As we noted in *Perkins* v. *Matthews*, 400 U. S. 379, 395–397 (1971), a local District Court is in a better position than this Court to fashion relief, because the District Court "is more familiar with the nuances of the local situation" and has the opportunity to hear evidence. *Id.*, at 397. In this case, the District Court for the Northern District of Mississippi will be better able to decide whether a special election is necessary, whether a more moderate form of interim relief will satisfy § 5,[25] or whether new elections are so imminent that special relief is inappropriate. We hold only that the Mississippi courts must withhold further implementation of the disputed change in election procedures until the parties demonstrate compliance with § 5. Accordingly, the judgment of the Mississippi Supreme Court is reversed, and the case is remanded for further proceedings not inconsistent with this opinion.

So ordered.

JUSTICE POWELL concurs in the judgment.

District of Columbia.

[25] For example, since the Attorney General objected only to the runoff procedure, the District Court simply might void the results of any runoff elections, permitting the candidates who gathered a plurality of votes in the general election to take those seats. We, of course, intimate no view on the best form of relief, leaving that matter to the District Court's discretion.

Our holding mandates reversal of the lower court judgment. [illegible]

[illegible]

for further proceedings not inconsistent with this opinion.

It is so ordered.

[illegible] concurs in the judgment.

[illegible]

SUPREME COURT OF THE UNITED STATES

No. 81-451

RALPH HATHORN, ET AL., PETITIONERS *v.* MRS. BOBBY LOVORN ET AL.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSISSIPPI

[June 15, 1982]

JUSTICE REHNQUIST, dissenting.

The provisions of §§ 5, 12(f), and 14(b) of the Voting Rights Act, referred to in the opinion of the Court, *ante*, at 11-12, convince me that Congress did not intend the state courts to play a role in the enforcement of that Act. In *Gulf Offshore Co.* v. *Mobile Oil Corp.*, 453 U. S. 473 (1981), upon which the Court heavily relies for its contrary conclusion, we said:

> "The factors generally recommending exclusive federal-court jurisdiction over an area of federal law include the desirability of uniform interpretation, the expertise of federal judges in federal law, and the assumed greater hospitality of federal courts to peculiarly federal claims." *Id.*, at 483-484 (footnotes omitted).

It seems to me that each of these factors counsels in favor of exclusive federal-court jurisdiction, and I do not understand the Court to contend otherwise.

From a practical point of view, I think the Court's decision is bound to breed conflicts between the state courts and the federal District Courts sitting within the States, each of which may now determine whether or not a particular voting change must be pre-cleared with the Attorney General before being enforced in a covered jurisdiction. Indeed, the precursor of such conflict may well be found in the Court's concluding observations that the District Court for the Northern District of Mississippi, in which the United States has pending a suit pertaining to the change involved in this case, should proceed to make determinations under the Voting Rights Act before the state court whose judgment we are reviewing renders further remedy in this case. Exactly what is to be left to the States under this construction is more than a little problematical.

I do not think that the goals of the Voting Rights Act will be materially advanced by the Court's somewhat tortured effort to make the state courts a third line of enforcement for the Act, after the District of Columbia courts and other federal District Courts. The principal effect of today's decision will be to enable one or the other of parties such as those involved in this case, neither of whom were intended to be primary beneficiaries of the Voting Rights Act, to employ the Act as another weapon in their arsenal of litigation strategies.

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(Slip Opinion)

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Lumber Co.*, 200 U. S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

MIDDLESEX COUNTY ETHICS COMMITTEE *v.* GARDEN STATE BAR ASSOCIATION ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 81-460. Argued March 31, 1982—Decided June 21, 1982

Under rules promulgated by the New Jersey Supreme Court pursuant to its authority under the State Constitution to license and discipline attorneys admitted to practice in the State, a claim of unethical conduct by an attorney is first considered by a local District Ethics Committee appointed by the Supreme Court. If a complaint is issued, the attorney whose conduct is challenged is served with the complaint and has 10 days to answer. Upon a determination that a prima facie case of unethical conduct exists, a formal hearing is held. The attorney charged may have counsel, discovery is available, and all witnesses are sworn. The Committee may ultimately dismiss the complaint, issue a private letter of reprimand, or forward a presentment to the statewide Disciplinary Review Board, which is also appointed by the Supreme Court. After a *de novo* review, the Board is required to make formal findings and recommendations to the Supreme Court, which reviews all decisions beyond a private reprimand and which permits briefing and oral argument for cases involving disbarment or suspension for more than one year. Respondent Hinds, a member of the New Jersey Bar, was served by petitioner, a local Ethics Committee, with a formal statement of charges of violating certain Supreme Court disciplinary rules. Instead of filing an answer to the charges, Hinds and the three respondent organizations of lawyers filed suit in Federal District Court, contending that the disciplinary rules violated their rights under the Federal Constitution. The court dismissed the complaint on the basis of the abstention principles of *Younger* v. *Harris*, 401 U. S. 37. The Court of Appeals reversed on the ground that the disciplinary proceedings did not provide a meaningful opportunity to adjudicate constitutional claims, notwithstanding an affidavit stating that the New Jersey Supreme Court would directly con-

Ju 6. 8/6:

sider Hinds' constitutional challenges and would consider whether such a procedure should be made explicit in the Supreme Court rules.

Held: The federal courts should abstain from interfering with the ongoing disciplinary proceeding within the jurisdiction of the New Jersey Supreme Court. Pp. 7–14.

(a) The policies underlying *Younger* are fully applicable to noncriminal judicial proceedings when important state interests are involved. Where such interests are involved, a federal court should abstain unless state law clearly bars the interposition of the constitutional claims. The pertinent inquiry is whether the state proceedings afford an adequate opportunity to raise the constitutional claims. Pp. 7–8.

(b) The New Jersey Supreme Court considers its disciplinary proceedings, beginning with the filing of a complaint with the local Ethics Committee, as "judicial in nature." As such, the proceedings are of a character to warrant federal-court deference. Pp. 8–9.

(c) The State has an extremely important interest in maintaining and assuring the professional conduct of the attorneys it licenses. The State's interest in the present litigation is demonstrated by the fact that petitioner, an agency of the New Jersey Supreme Court, is the named defendant in the present suit and was the body which initiated the state proceedings against Hinds. The importance of the state interest in the pending state judicial proceedings and in the federal case calls *Younger* abstention into play. Pp. 10–11.

(d) In light of the unique relationship between the New Jersey Supreme Court and the local Ethics Committee, and in view of the nature of the proceedings, it cannot be concluded that there was no "adequate opportunity" for Hinds to raise his constitutional claims. Any doubt as to this matter was laid to rest by the New Jersey Supreme Court's subsequent actions when, prior to the filing of the petition for certiorari in this Court, it *sua sponte* entertained the constitutional issues raised by Hinds. And there is no reason to disturb the District Court's unchallenged findings that there was no bad faith or harrassment on petitioner's part and that the state disciplinary rules were not "flagrantly and patently" unconstitutional. Nor have any other extraordinary circumstances been presented to indicate that abstention would not be appropriate. Pp. 11–13.

643 F. 2d 119 and 651 F. 2d 154, reversed and remanded.

BURGER, C. J., delivered the opinion of the Court, in which WHITE, POWELL, REHNQUIST, and O'CONNOR, JJ., joined. BRENNAN, J., filed an opinion concurring in the judgment. MARSHALL, J., filed an opinion concurring in the judgment, in which BRENNAN, BLACKMUN, and STEVENS, JJ., joined.

NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D.C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

SUPREME COURT OF THE UNITED STATES

No. 81-460

MIDDLESEX COUNTY ETHICS COMMITTEE, ETC., PETITIONER *v.* GARDEN STATE BAR ASSOCIATION, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

[June 21, 1982]

CHIEF JUSTICE BURGER delivered the opinion of the Court.

We granted certiorari to determine whether a federal court should abstain from considering a challenge to the constitutionality of disciplinary rules that are the subject of a pending state disciplinary proceeding within the jurisdiction of the New Jersey Supreme Court. — U. S. — (1981). The Court of Appeals held that it need not abstain under *Younger* v. *Harris*, 401 U. S. 37 (1971). We reverse.

I

A

The Constitution of New Jersey charges the State Supreme Court with the responsibility for licensing and disciplining attorneys admitted to practice in the State. Art. 6, §2, ¶3.[1] Under the rules established by the New Jersey Supreme Court, enacted pursuant to its constitutional authority, a complaint moves through a three-tier procedure. First, local District Ethics Committees appointed by the State Supreme Court are authorized to receive complaints relating to claimed unethical conduct by an attorney. New Jersey Court Rule 1:20–2(d). At least two of the minimum of eight members of the District Ethics Committee must be nonattorneys. Complaints are assigned to an attorney member of the Committee to report and make a recommendation. Rule 1:20–2(h). The decision whether to proceed with the complaint is made by the person who chairs the Ethics Committee. If a complaint is issued by the Ethics Committee it must state the name of the complainant, describe the claimed improper conduct, cite the relevant rules, and state, if known, whether the same or a similar complaint has been considered by any other Ethics Committee. The attorney whose conduct is challenged is served with the complaint and has 10 days to answer.[2]

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[1] 1. Art. 6, §2, ¶3 provides:

"The Supreme Court shall make rules governing the administration of all courts in the State and, subject to the law, the practice and procedure in all such courts. The Supreme Court shall have jurisdiction over the admission to the practice of law and the discipline of persons admitted."

Unless good cause appears for referring the complaint to another committee member, each complaint is referred to the member of the Committee who conducted the initial investigation for review and further investigation, if necessary. The committee member submits a written report stating whether a prima facie indication of unethical or unprofessional conduct has been demonstrated. The report is then evaluated by the chairman of the Ethics Committee to determine whether a prima facie case exists. Absent a prima facie showing, the complaint is summarily dismissed. If a prima facie case is found, a formal hearing on the complaint is held before three or more members of the Ethics Committee, a majority of whom must be attorneys. The lawyer who is charged with unethical conduct may have counsel, discovery is available, and all witnesses are sworn. The panel is required to prepare a written report with its findings of fact and conclusions. The full Committee, following the decision of the panel, has three alternatives. The Committee may dismiss the complaint, prepare a private letter of reprimand, or prepare a presentment to be forwarded to the Disciplinary Review Board. Rule 1:20–2(o).[3]

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[2] For a more detailed explanation of the disciplinary procedure of the District Ethics Committees, see Rule 1:20–2. As noted below, the procedure, as amended in 1981, now provides that a charged attorney may raise constitutional questions in the District Committees. Any constitutional challenges are to be set forth in the answer to the complaint. Rule 1:20–2(j) now provides:

"All constitutional questions shall be withheld for consideration by the Supreme Court as part of its review of the final decision of the Disciplinary Review Board. Interlocutory relief may be sought only in accordance with R. 1:20–4(d)(i)."

The Disciplinary Review Board, a state-wide board which is also appointed by the Supreme Court, consists of nine members, at least five of whom must be attorneys and at least three of whom must be nonattorneys. The Board makes a *de novo* review. Rule 1:20–3(d)(3).[4] The Board is required to make formal findings and recommendations to the New Jersey Supreme Court.

All decisions of the Disciplinary Review Board beyond a private reprimand are reviewed by the New Jersey Supreme Court. Briefing and oral argument are available in the Supreme Court for cases involving disbarment or suspension for more than one year. Rule 1:20–4.

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[3] Each District Ethics Committee appoints one member of the bar to serve as Secretary. The Secretary maintains records of the proceedings. The Secretary also transmits copies of all documents filed to the Division of Ethics and Professional Services. Rule 1:20–2(c).

[4] Subsequent to the initiation of the disciplinary hearing involved in this case, Rule 1:20–3(e) was amended to provide:

"Constitutional challenges to the proceedings not raised before the District Committee shall be preserved, without Board action, for Supreme Court consideration as part of its review of the matter on the merits. Interlocutory relief may be sought only in accordance with Rule 1:20–4(d)(i)."

B

Respondent Lennox Hinds, a member of the New Jersey bar, served as executive director of the National Conference of Black Lawyers at the time of his challenged conduct. Hinds represented Joanne Chesimard in a civil proceeding challenging her conditions of confinement in jail. In 1977 Chesimard went to trial in state court for the murder of a policeman. Respondent Hinds was not a counsel of record for Chesimard in the murder case. However, at the outset of the criminal trial Hinds took part in a press conference, making statements critical of the trial and of the trial judge's judicial temperament and racial insensitivity. In particular, Hinds referred to the criminal trial as "a travesty," a "legalized lynching," and "a kangaroo court."

One member of the Middlesex County Ethics Committee read news accounts of Hinds' comments and brought the matter to the attention of the Committee. In February of 1977 the Committee directed one of its members to conduct an investigation. A letter was written to Hinds, who released the contents of the letter to the press. The Ethics Committee on its own motion then suspended the investigation until the conclusion of the Chesimard criminal trial.

After the trial was completed the Committee investigated the complaint and concluded that there was probable cause to believe that Hinds had violated DR 1-102(A)(5) of the Disciplinary Rules of the Code of Professional Responsibility.[5] That section provides that "A lawyer shall not . . . [e]ngage in conduct that is prejudicial to the administration of justice." Respondent Hinds also was charged with violating DR 7-107(D), which prohibits extrajudicial statements by lawyers associated with the prosecution or defense of a criminal matter.[6] The Committee then served a formal statement of charges on Hinds.

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[5] The Disciplinary Rules of the Code of Professional Responsibility and Code of Judicial Conduct of the American Bar Association, with amendment and supplementation, have been adopted by the New Jersey Supreme Court as the applicable standard of conduct for members of the bar and the judges of New Jersey. New Jersey Court Rule 1:14.

Instead of filing an answer to the charges in accordance with the New Jersey bar disciplinary procedures, Hinds and the three respondent organizations filed suit in the United States District Court for the District of New Jersey contending that the disciplinary rules violated respondents' First Amendment rights. In addition, respondents charged that the disciplinary rules were facially vague and overbroad. The District Court granted petitioner's motion to dismiss based on *Younger* v. *Harris*, 401 U. S. 37 (1971), concluding that "[t]he principles of comity and federalism dictate that the federal court abstain so that the state is afforded the opportunity to interpret its rules in the face of a constitutional challenge." App. 53a–54a. At respondents' request the District Court reopened the case to allow respondents an opportunity to establish bad faith, harassment or other extraordinary circumstance which would constitute an exception to *Younger* abstention. *Dombrowski* v. *Pfister*, 380 U. S. 479 (1965). After two days of hearings the District Court found no evidence to justify an exception to the *Younger* abstention doctrine and dismissed the federal court complaint.

A divided panel of the United States Court of Appeals for the Third Circuit reversed on the ground that the state bar disciplinary proceedings did not provide a meaningful opportunity to adjudicate constitutional claims. The court reasoned that the disciplinary proceedings in this case are unlike the state judicial proceedings to which the federal courts usually defer. The Court of Appeals majority viewed the proceedings in this case as administrative, "nonadjudicative" proceedings analogous to the preindictment stage of a criminal proceeding.[7]

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[6] DR 7–107 deals with "Trial Publicity" and states:

"(D) During the selection of a jury or the trial of a criminal matter, a lawyer or law firm associated with the prosecution or defense of a criminal matter shall not make or participate in making an extra-judicial statement that he expects to be disseminated by means of public communication and that relates to the trial, parties, or issues in the trial or other matters that are reasonably likely to interfere with a fair trial. . . ."

On petition for rehearing petitioners attached an affidavit from the Clerk of the New Jersey Supreme Court which stated that the New Jersey Supreme Court would directly consider Hinds' constitutional challenges and that the court would consider whether such a procedure should be made explicit in the Supreme Court rules. On reconsideration a divided panel of the Third Circuit declined to alter its original decision, stating that the relevant facts concerning abstention are those that existed at the time of the District Court's decision.[8]

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[7] The majority concluded that the hearings are designed to elicit facts, not legal arguments, as indicated by the presence of nonlawyers. The court also found that the ability to raise constitutional claims before the Ethics Committee does not constitute a meaningful opportunity to have constitutional questions adjudicated. No formal opinion is filed by the District Ethics Committee. The Third Circuit distinguished *Gipson* v. *New Jersey Supreme Ct*, 558 F. 2d 701 (CA3 1977), on the ground that in *Gipson* the attorney being disciplined was already subject to the state court action at the time the federal proceeding had been initiated.

Judge Adams, concurring, emphasized that state courts have the primary responsibility to discipline their bar and, in general, the federal judiciary is to exercise no supervisory powers. Judge Weis, dissenting, argued that respondents have full opportunity in the New Jersey proceeding to raise constitutional issues, concluding that the disciplinary proceedings are not a series of separate segments before independent bodies but are part of a whole. Judge Weis also concluded that there was nothing to prevent the Ethics Committee from considering constitutional claims.

[8] The panel majority noted that no rule existed at the time of the District Court's decision to assure the Court of Appeals that the New Jersey Supreme Court would consider the constitutional claims. The court also concluded that the possibility of a formal procedure of the New Jersey Court for consideration of constitutional claims does not moot this case be-

Pending review in this Court, the New Jersey Supreme Court has heard oral arguments on the constitutional challenges presented by respondent Hinds and has adopted a rule allowing for an aggrieved party in a disciplinary hearing to seek interlocutory review of a constitutional challenge to the proceedings.[9]

II

A

Younger v. *Harris*, 401 U. S. 37 (1971), and its progeny espouse a strong federal policy against federal court interference with pending state judicial proceedings absent extraordinary circumstances. The policies underlying *Younger* abstention have been frequently reiterated by this Court. The notion of "comity" includes "a proper respect for state functions, a recognition of the fact that the entire country is made up of a Union of separate state governments, and a continuance of the belief that the National Government will fare best

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cause the underlying dispute as to the validity of the rules still remains. Judge Weis, again dissenting, concluded that no justiciable controversy remained as to the issue in the Court of Appeals and recommended that the case be remanded and dismissed as moot.

[9] Rule 1:20-4(d) states:

"(i) Interlocutory Review. An aggrieved party may file a motion for leave to appeal with the Supreme Court to seek interlocutory review of a constitutional challenge to proceedings pending before the District Ethics Committee or the Disciplinary Review Board. The motion papers shall conform to R. 2:8-1. Leave to appeal may be granted only when necessary to prevent irreparable injury. If leave to appeal is granted, the record below may, in the discretion of the Court, be supplemented by the filing of briefs and oral argument.

(ii) Final Review. In any case in which a constitutional challenge to the proceedings has been properly raised below and preserved pending review of the merits of the disciplinary matter by the Supreme Court, the aggrieved party may, within 10 days of the filing of the report and recommendation of the Disciplinary Review Board, seek the review of the Court by proceeding in accordance with the applicable provisions of R. 1:19-8."

if the States and their institutions are left free to perform their separate functions in their separate ways." *Id.*, at 44.[10] Minimal respect for the state processes, of course, precludes any *presumption* that the state courts will not safeguard federal constitutional rights.

The policies underlying *Younger* are fully applicable to noncriminal judicial proceedings when important state interests are involved. *Moore* v. *Sims*, 442 U. S. 415, 423 (1979); *Huffman* v. *Pursue, Ltd.*, 420 U. S. 592, 604–605 (1975). The importance of the state interest may be demonstrated by the fact that the noncriminal proceedings bear a close relationship to proceedings criminal in nature, as in *Huffman*, *supra*. Proceedings necessary for the vindication of important state policies or for the functioning of the state judicial system also evidence the state's substantial interest in the litigation. *Trainor* v. *Hernandez*, 431 U. S. 434 (1977); *Juidice* v. *Vail*, 430 U. S. 327 (1977). Where vital state interests are involved, a federal court should abstain "unless state law clearly bars the interposition of the constitutional claims." *Moore*, *supra*, at 426. "[T]he . . . pertinent inquiry is whether the state proceedings afford an adequate opportunity to raise the constitutional claims. . . ." *Id.*, at 430. See also *Gibson* v. *Berryhill*, 411 U. S. 564 (1973).

The question in this case is threefold: *first*, do state bar disciplinary hearings within the constitutionally prescribed jurisdiction of the State Supreme Court constitute an ongoing state judicial proceeding; *second*, do the proceedings implicate important state interests; and *third*, is there an adequate opportunity in the state proceedings to raise constitutional challenges.

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[10] *Samuels* v. *Mackell*, 401 U. S. 66 (1971), concluded that the same comity and federalism principles govern the issuance of federal court declaratory judgments concerning the state statute that is the subject of the ongoing state criminal proceeding.

B

The State of New Jersey, in common with most States,[11] recognizes the important state obligation to regulate persons who are authorized to practice law. New Jersey expresses this in a state constitutional provision vesting in the New Jersey Supreme Court the authority to fix standards, regulate admission to the bar, and enforce professional discipline among members of the bar. New Jersey Const. Art. 6, §2, ¶3. The Supreme Court of New Jersey has recognized that the local District Ethics Committees act as the arm of the court in performing the function of receiving and investigating complaints and holding hearings. Rule 1:20-2; *In re Logan*, 70 N. J. 222, 358 A. 2d 787 (1976). The New Jersey Court has made clear that filing a complaint with the local ethics and grievance committee "is in effect a filing with the Supreme Court. . . ." *Toft* v. *Ketchum*, 18 N. J. 280, 284, 113 A. 2d 671, 674, cert. denied, 350 U. S. 887 (1955). "From the very beginning a disciplinary proceeding is judicial in nature, initiated by filing a complaint with an ethics and grievance committee."[12] *Ibid.* It is clear beyond doubt that the New Jersey Supreme Court considers its bar disciplinary proceedings as "judicial in nature."[13] As such, the proceedings are of a character to warrant federal court deference. The remaining inquiries are whether important state interests are implicated so as to warrant federal court abstention and whether the federal plaintiff has an adequate opportunity to present the federal challenge.

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[11] See Shoaf, State Disciplinary Enforcement Systems Structural Survey (ABA National Center for Professional Responsibility 1980).

The New Jersey allocation of responsibility is consistent with §2.1 of the ABA Standards for Lawyer Discipline and Disability Proceedings (Proposed Draft 1978), which states that the "[u]ltimate and exclusive responsibility within a state for the structure and administration of the lawyer discipline and disability system and the disposition of individual cases is within the inherent power of the highest court of the state."

The rationale for vesting responsibility with the judiciary is that the practice of law "is so directly connected and bound up with the exercise of judicial power and the administration of justice that the right to define and regulate it naturally and logically belongs to the judicial department." *Id.*, commentary at §2.1.

[12] The New Jersey Supreme Court has concluded that bar disciplinary proceedings are neither criminal nor civil in nature, but rather are *sui generis*. *In re Logan*, 70 N. J. 222, 358 A. 2d 787 (1976). See also, Standards for Lawyer Discipline and Disability Proceedings §1.2 (Proposed

C

The State of New Jersey has an extremely important interest in maintaining and assuring the professional conduct of the attorneys it licenses. States traditionally have exercised extensive control over the professional conduct of attorneys. See *supra*, n. 11. The ultimate objective of such control is "the protection of the public, the purification of the bar and the prevention of a reoccurrence." *In re Baron*, 25 N. J. 445, 449, 136 A. 2d 873, 875 (1957). The judiciary as well as the public is dependent upon professionally ethical conduct of

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Draft 1978). As recognized in *Juidice* v. *Vail*, *supra*, however, whether the proceeding "is labeled civil, quasi-criminal, or criminal in nature," the salient fact is whether federal court interference would unduly interfere with the legitimate activities of the state. *Id.*, at 335–336.

The instant case arose before the 1978 rule change. In 1978 the New Jersey Supreme Court established a Disciplinary Review Board charged with review of findings of District Ethics Committees. Nothing in this rule change, however, altered the nature of such proceedings. The responsibility under Art. 6, § 2, ¶ 3 remains with the New Jersey Supreme Court.

[13] The role of local ethics or bar association committees may be analogized to the function of a special master. *Anonymous* v. *Assn of the Bar of City of New York*, 515 F. 2d 427 (CA2), cert. denied, 423 U. S. 863 (1975). The essentially judicial nature of disciplinary actions in New Jersey has been recognized previously by the federal courts. In *Gipson* v. *New Jersey Supreme Court*, 558 F. 2d 701 (CA3 1977), the United States Court of Appeals for the Third Circuit agreed that "incursions by federal courts into ongoing [New Jersey] disciplinary proceedings would be particularly disruptive of notions of comity." *Id.*, at 704.

attorneys and thus has a significant interest in assuring and maintaining high standards of conduct of attorneys engaged in practice. See *In re Stein,* 1 N. J. 228, 237, 62 A. 2d 801, 805 (1949), quoting *In re Cahill,* 66 N. J. L. 527, 50 A. 119 (Sup. Ct. 1901). The state's interest in the professional conduct of attorneys involved in the administration of criminal justice is of special importance. Finally, the state's interest in the present litigation is demonstrated by the fact that the Middlesex Gounty Ethics Committee, an agency of the Supreme Court of New Jersey, is the named defendant in the present suit and was the body which initiated the state proceedings against respondent Hinds.

The importance of the state interest in the pending state judicial proceeding and in the federal case calls *Younger* abstention into play. So long as the constitutional claims of respondents can be determined in the state proceedings and so long as there is no showing of bad faith, harrassment or some other extraordinary circumstance that would make abstention inappropriate, the federal courts should abstain.

D

Respondent Hinds contends that there was no opportunity in the state disciplinary proceeding to raise his federal constitutional challenge to the disciplinary rules. Yet Hinds failed to respond to the complaint filed by the local Ethics Committee and failed even to *attempt* to raise any federal constitutional challenge in the state proceeding. Under the New Jersey procedure, its Ethics Committees constantly are called upon to interpret the state disciplinary rules. Respondent Hinds points to nothing existing at the time the complaint was brought by the local Committee to indicate that the members of the Ethics Committee, the majority of whom are lawyers, would have refused to consider a claim that the rules which they were enforcing violated federal constitutional guarantees. Abstention is based upon the theory that "'[t]he accused should first set up and rely upon his defense in the state courts, even though this involves a challenge of the validity of some statute, unless it plainly appears that this course would not afford adequate protection.'" *Younger* v. *Harris*, *supra*, at 45, quoting *Fenner* v. *Boykin*, 271 U. S. 240, 243–244 (1926).

In light of the unique relationship between the New Jersey Supreme Court and the local Ethics Committee, and in view of the nature of the proceedings, it is difficult to conclude that there was no "adequate opportunity" for respondent Hinds to raise his constitutional claims.[14] *Moore, supra,* at 430.

Whatever doubt, if any, that may have existed about respondent Hinds' ability to have constitutional challenges hear in the bar disciplinary hearings was laid to rest by the subsequent actions of the New Jersey Supreme Court. Prior to the filing of the petition for certiorari in this Court the New Jersey Supreme Court *sua sponte* entertained the constitutional issues raised by respondent Hinds. Respondent Hinds therefore has had abundant opportunity to present his constitutional challenges to the state disciplinary proceedings.[15]

There is no reason for the federal courts to ignore this sub-

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[14] This case is distinguishable from *Steffel* v. *Thompson*, 415 U. S. 452, 462 (1974), in which there was no ongoing state proceeding to serve as a vehicle for vindicating the constitutional rights of the federal plaintiff. This case is also distinguishable from *Gerstein* v. *Pugh*, 420 U. S. 103, 108, n. 9 (1975), in which the issue of the legality of a pretrial detention could not be raised in defense of a criminal prosecution. See also *Juidice* v. *Vail, supra,* at 337.

[15] In addition, after the filing of the writ of certiorari the New Jersey Supreme Court amended the State bar disciplinary rules to expressly permit a motion directly to the New Jersey Supreme Court for interlocutory adjudication of constitutional issues. Rule 1:20–4(d)(i). See note 9 *supra*. Even if interlocutory review is not granted, constitutional issues are preserved for consideration by the New Jersey Supreme Court. Rule 1:20–2(j).

The New Jersey Supreme Court reviews all disciplinary actions except the issuance of private letters of reprimand. Rule 1:20–4. Rule 1:20–2(j), sequent development. In *Hicks* v. *Miranda*, 422 U. S. 332 (1975), we held that "where state criminal proceedings are begun against the federal plaintiffs after the federal complaint is filed but before any proceedings of substance on the merits have taken place in federal court, the principles of *Younger* v. *Harris* should apply in full force." *Id.*, at 349. An analogous situation is presented here; the principles of comity and federalism which call for abstention remain in full force. Thus far in the federal court litigation the sole issue has been whether abstention is appropriate. No proceedings have occurred on the merits and therefore no federal proceedings on the merits will be terminated by application of *Younger* principles. It would trivialize the principles of comity and federalism if federal courts failed to take into account that an adequate state forum for all relevant issues has clearly been demonstrated to be available prior to any proceedings on the merits in federal court. *Id.*, at 350.[16]

Respondents have not challenged the findings of the District Court that there was no bad faith or harassment on the part of petitioners and that the state rules were not "flagrantly and patently" unconstitutional. *Younger*, *supra*, at 53, quoting *Watson* v. *Buck*, 313 U. S. 387, 402 (1941). App. 50a–52a. We see no reason to disturb these findings, and no other extraordinary circumstances have been presented to indicate that abstention would not be appropriate.[17]

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however, requires that all constitutional issues be withheld for consideration by the Supreme Court as part of its review of the decision of the Disciplinary Review Board. This appears to provide for Supreme Court review of constitutional challenges even when a private reprimand is made.

[16] Indeed, the decision of the New Jersey Supreme Court to consider respondent Hinds' constitutional challenges indicates that the state court desired to give Hinds a swift judicial resolution of his constitutional claims.

[17] It is not clear whether the Court of Appeals decided whether abstention would be proper as to the respondent organizations who are not parties to the state disciplinary proceedings. We leave this issue to the Court of Appeals on remand.

III

Because respondent Hinds had an "opportunity to raise and have timely decided by a competent state tribunal the federal issues involved," *Gibson* v. *Berryhill*, 411 U. S., at 577, and because no bad faith, harassment or other exceptional circumstances dictate to the contrary, federal courts should abstain from interfering with the ongoing proceedings. Accordingly, the judgment of the United States Court of Appeals for the Third Circuit is reversed, and the case remanded for further proceedings consistent with this opinion.

Reversed and remanded.

SUPREME COURT OF THE UNITED STATES

No. 81-460

MIDDLESEX COUNTY ETHICS COMMITTEE, ETC., PETITIONER *v.* GARDEN STATE BAR ASSOCIATION, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

[June 21, 1982]

JUSTICE BRENNAN, concurring in the judgment.

For the reasons stated by JUSTICE MARSHALL, I join the judgment in this case. I agree that federal courts should show particular restraint before intruding into an ongoing disciplinary proceeding by a state court against a member of the State's bar, where there is an adequate opportunity to raise federal issues in that proceeding. The traditional and primary responsibility of state courts for establishing and enforcing standards for members of their bars and the quasi-criminal nature of bar disciplinary proceedings, *In re Ruffalo*, 390 U. S. 544, 551 (1968), call for exceptional deference by the federal courts. See *Gipson* v. *New Jersey Supreme Court*, 558 F. 2d 701, 703–704 (CA3 1977); *Erdmann* v. *Stevens*, 458 F. 2d 1205, 1209–1210 (CA2 1972). I continue to adhere to my view, however, that *Younger* v. *Harris*, 401 U. S. 37 (1971), is in general inapplicable to civil proceedings. See *Huffman* v. *Pursue, Ltd.*, 420 U. S. 592, 613 (1975) (BRENNAN, J., dissenting).

SUPREME COURT OF THE UNITED STATES

No. 81-460

MIDDLESEX COUNTY ETHICS COMMITTEE, ETC., PETITIONER *v.* GARDEN STATE BAR ASSOCIATION ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

[June 21, 1982]

JUSTICE MARSHALL, with whom JUSTICE BRENNAN, JUSTICE BLACKMUN and JUSTICE STEVENS join, concurring in the judgment.

I agree with much of the general language in the Court's opinion discussing the importance of the State's interest in regulating the professional conduct of its attorneys. However, I believe that the question whether *Younger* abstention would have been appropriate at the time that the District Court or the Court of Appeals considered this issue is not as simple as the Court's opinion might be read to imply. As the Court acknowledges, absent an ongoing judicial proceeding in which there is an adequate opportunity for a party to raise federal constitutional challenges, *Younger* is inapplicable. *Ante*, at 8. See also *Gibson* v. *Berryhill*, 411 U. S. 564, 577 (1973). Here, it is unclear whether, at the time the lower courts addressed this issue, there was an adequate opportunity in the state disciplinary proceedings to raise a constitutional challenge to the disciplinary rules. Furthermore, it is unclear whether proceedings before the Ethics Committee are more accurately viewed as prosecutorial rather than judicial in nature.

I agree with the Court that we may consider events subsequent to the decisions of the courts below because the federal litigation has addressed only the question whether abstention is appropriate. Thus far, there have been no proceedings on the merits in federal court. *Ante*, at 12–13. After the Court of Appeals rendered its decision and denied petitioner's petition for rehearing, the New Jersey Supreme Court certified the complaint against respondent Hinds to itself. App. to Pet. for Cert. 62. Now, there are ongoing judicial proceedings in the New Jersey Supreme Court in which Hinds has been given the opportunity to raise his constitutional challenges. As a result, *Younger* abstention, at least with respect to Hinds, is appropriate at this time. For this reason only, I join the judgment of the Court.

O

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All issues available have been filmed.
Unfortunately, any scattered missing issues are no longer available.

981/81-497

(Slip Opinion)

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Lumber Co.*, 200 U. S. 321, 337.

SUPREME COURT OF THE UNITED STATES

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Syllabus

SUMMIT VALLEY INDUSTRIES, INC. *v.* LOCAL 112, UNITED BROTHERHOOD OF CARPENTERS & JOINERS OF AMERICA

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 81-497. Argued April 28, 1982—Decided June 1, 1982

As the result of a labor dispute between petitioner employer and respondent union, petitioner filed an unfair labor practice charge against the union, alleging that it had violated the secondary boycott and jurisdictional picketing prohibitions of § 8(b)(4) of the National Labor Relations Act (NLRA). The National Labor Relations Board (Board) found against the union, and the Board's order was judicially enforced. Petitioner filed this action in Federal District Court pursuant to § 303 of the Labor Management Relations Act (LMRA), seeking damages resulting from the union's illegal activity in an amount that included both business losses and attorney's fees incurred during the Board proceedings. Section 303(a) makes it unlawful for a union to engage in conduct defined as an unfair labor practice under § 8(b)(4) of the NLRA, and § 303(b) provides that whoever is injured in his business or property because of a violation of § 303(a) may sue in a federal district court "and shall recover the damages by him sustained and the cost of the suit." The District Court entered judgment for petitioner, awarding it an amount that represented its business losses, but concluded that petitioner was not entitled to recover attorney's fees as part of its damages. The Court of Appeals affirmed.

Held: Attorney's fees incurred during Board proceedings are not a proper element of damages under § 303(b) of the LMRA. Pp. 4–10.

(a) Neither the language nor the legislative history of § 303 supports petitioner's contention that § 303 provides statutory authorization for such attorney's fees for purposes of the American Rule that attorney's fees are not ordinarily recoverable in the absence of a statute or enforceable contract providing therefor. The legislative history instead shows

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that Congress did not intend to expand the ordinary meaning of the term "damages" in § 303(b) to include attorney's fees. Cf. *Teamsters* v. *Morton*, 377 U. S. 252. Pp. 4–7.

(b) Nor can allowance of attorney's fees incurred during Board proceedings be justified on the asserted ground that it would further Congress' intent to protect employers from the adverse effects of a union's illegal secondary activity. This interest is adequately protected by the award of compensatory damages for the business losses resulting from the union's prohibited conduct. Even assuming that attorney's fees are necessary to "fully" compensate the victimized employer, this justification alone is not sufficient to create an exception to the American Rule in the absence of express congressional authority. Cf. *F. D. Rich Co.* v. *United States ex rel. Industrial Lumber Co.*, 417 U. S. 116, 128–129. To adopt petitioner's analysis would authorize the recovery of attorney's fees in every case where the plaintiff has prevailed against the defendant in prior litigation involving the same issues. Such a result is clearly barred by this Court's prior decisions and by the American Rule. Pp. 7–10.

652 F. 2d 65, affirmed.

MARSHALL, J., delivered the opinion for a unanimous Court.

NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D.C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

SUPREME COURT OF THE UNITED STATES

No. 81-497

SUMMIT VALLEY INDUSTRIES, PETITIONER *v.* LOCAL 112, UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

[June 1, 1982]

JUSTICE MARSHALL delivered the opinion of the Court.

We granted certiorari to decide whether § 303 of the Labor Management Relations Act (LMRA), 29 U. S. C. 187, authorizes the recovery of attorney's fees incurred in prior proceedings before the National Labor Relations Board (Board). —— U. S. —— (1981). The courts of appeals have divided on this issue.[1] In this case, the Court of Appeals for the Ninth Circuit held that attorney's fees may not be recovered. *Summit Valley Industries, Inc.* v. *Local 112, United Brotherhood of Carpenters and Joiners of America,* Civ. No. 79-4663 (CA9 1981). We affirm.

I

Petitioner Summit Valley Industries (Summit Valley) manufactures prefabricated modular homes. These homes are completed at petitioner's plant and sold directly to home buyers. The buyer then independently obtains the services of a local contractor to install the completed home and to attach ancillary structures. In June 1972, Summit Valley opened a plant in the Butte, Montana area. Rather than utilizing skilled union carpenters at this plant, petitioner hired unskilled workers. These workers were represented by Butte Teamsters Union, Local No. 2 (Teamsters), under a collective-bargaining agreement between the Teamsters and Summit Valley.

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[1] The Fifth, Sixth and Eighth Circuits have held that attorney's fees may be recovered. See *Associated General Contractors of Minnesota* v. *Construction and General Laborers Local No. 563*, 612 F. 2d 1060 (CA8 1979); *Texas Distributors, Inc.* v. *Local Union No. 100*, 598 F. 2d 393 (CA5 1979); *Local Union No. 984, International Brotherhood of Teamsters* v. *Humko Co.*, 287 F. 2d 231 (CA6), *cert denied*, 366 U. S. 962 (1961). The First Circuit has expressed approval of this rule in dicta. See *F. F. Instrument Corp.* v. *Union de Tronquistas de Puerto Rico*, 558 F. 2d 607, 611 (CA1 1977). The Ninth Circuit alone has reached a contrary conclusion. See *Mead* v. *Retail Clerks Local 839*, 523 F. 2d 1371 (CA9 1975).

Upon learning that Summit Valley employed no skilled carpenters, respondent Local 112 of the United Brotherhood of Carpenters and Joiners of America (Union) filed unfair labor practice charges against Summit Valley. The Union claimed that Summit Valley had violated a valid work preservation agreement between the Union and area contractor associations. Although the Union withdrew these charges when it realized that Summit Valley was not a signatory to the agreement, it ordered its members not to work on the installation of petitioner's homes. On at least two occasions, Summit Valley sent its own employees to complete the installation work that would otherwise have been done by the Union. As a result, respondent began picketing petitioner's plant.

Summit Valley filed an unfair labor practice charge against the Union, alleging that respondent's work stoppage and picketing violated the secondary boycott and jurisdictional picketing prohibitions of the National Labor Relations Act (NLRA). §§8(b)(4)(B) and 8(b)(4)(D) of the NLRA, 29 U. S. C. §§158(b)(4)(B), (D). The Regional Director of the Board initiated a §10(*l*) proceeding, 29 U. S. C. §160(*l*), in the United States District Court for the District of Montana. The District Court imposed a temporary restraining order pending the outcome of the proceeding before the Board. *Henderson* v. *United Brotherhood of Carpenters and Joiners* *of America, Local 112,* Civ. Nos. 2235 & 2239 (D Mont. 1972). The Union ceased picketing in November 1972, and its members resumed the installation of Summit Valley's homes.

Summit Valley then initiated a § 10(*k*) proceeding, 29 U. S. C. § 160(*k*), seeking resolution of its claim that the Union had engaged in illegal jurisdicitonal picketing, prohibited by § 8(b)(4)(D). After a two-day hearing, the Board found against the Union, holding that Summit Valley had validly assigned the work in question to the Teamsters. *Carpenters, Local 112 (Summit Valley Industries),* 202 NLRB No. 153, 83 LRRM 1013 (1973). The Union agreed not to pressure Summit Valley to reassign work in violation of its collective-bargaining agreement with the Teamsters. However, the Union maintained that it had the right to truthfully advise the public that petitioner did not employ it's members in the construction of modular homes.

After the § 10(*k*) proceeding, an Administrative Law Judge (ALJ) conducted 15 days of hearings on the unfair labor practice charges. The ALJ concluded that the Union had violated § 8(b)(4)(B) and § 8(b)(4)(D), but that the Union had sought to enforce the work preservation clause on the good faith belief that its actions were lawful. The Board adopted the findings of the ALJ, and it ordered the Union to cease and desist from these unfair labor practices, and to fully comply with the Board's order obtained as a result of the 10(*k*) proceeding. *Carpenters, Local 112 (Summit Valley Industries),* 217 N.L.R.B. No. 129, 89 LRRM 1799 (1975). The Court of Appeals for the Ninth Circuit enforced the Board's order. *United Brotherhood of Carpenters and Joiners of America, Local 112* v. *NLRB,* 574 F. 2d 457 (CA9 1978).

This action was filed pursuant to § 303 of the LMRA in the United States District Court for the District of Montana. Summit Valley sought damages resulting from the Union's illegal secondary and jurisdictional activity in the amount of $17,279.33: $3,675.00 in business losses, and $13,604.33 in attorney's fees incurred during the Board proceedings. The

District Court found that the Board's decision that the Union had committed unfair labor practices collaterally estopped the Union from relitigating this issue in the § 303 action. Relying on the *Mead* v. *Retail Clerks Local 839*, 523 F. 2d 1371 (CA9 1975), the District Court concluded that Summit Valley was not entitled to recover attorney's fees as part of its damages. The court entered judgment for Summit Valley, awarding it an amount that represented its business losses. *Summit Valley Industries, Inc.* v. *Local 112, United Brotherhood of Carpenters and Joiners of America*, 475 F. Supp. 665 (D Mont. 1979). The Court of Appeals affirmed in an unpublished per curiam. *Summit Valley Industries, Inc.* v. *Local 112, United Brotherhood of Carpenters and Joiners of America*, Civ. No. 79-4663 (CA9 1981).

II

Under the American Rule it is well-established that attorney's fees "are not ordinarily recoverable in the absence of a statute or enforceable contract providing therefor." *Fleischman Distilling Corp.* v. *Maier Brewing Co.*, 386 U. S. 714, 717 (1967). This Court has endorsed certain exceptions to this rule where necessary to further the interests of justice. See, *e. g.*, *Vaughan* v. *Atkinson*, 369 U. S. 527 (1962) (bad faith); *Toledo Scale Co.* v. *Computing Scale Co.*, 261 U. S. 399 (1923) (willful disobediance of a court order); *Central Railroad & Banking Co.* v. *Pettus*, 113 U. S. 116 (1885) (common fund). In the absence of one of these equitable exceptions, however, the rule has been consistently followed for almost 200 years. See *Alyeska Pipeline Co.* v. *Wilderness Society*, 421 U. S. 240, 249-250 (1975); *Arcambel* v. *Wiseman*, 3 Dall. 306 (1796). Recognizing this consistent adherance to the American Rule, petitioner contends that § 303 provides express statutory authorization for the recovery of attorney's fees incurred in prior Board proceedings. We find this contention unsupported by either the language or the legislative history of § 303.

Section 303 authorizes a private damage action for an employer who has been injured by a union's unfair labor practice. Section 303(a) makes it unlawful for a labor organization to engage in conduct defined as an unfair labor practice under § 8(b)(4) of the NLRA, 29 U. S. C. § 187(a). As a remedy for this conduct § 303(b) provides that "[w]hoever shall be injured in his business or property by reason of any violation of subsection (a) of this section may sue therefor in any district court of the United States . . . and shall recover the damages by him sustained and the cost of the suit." 29 U. S. C. § 187(b).

Section 303 does not expressly provide for the recovery of attorney's fees, so we are not presented with a situation where Congress has made "specific and explict provisions for the allowance of" such fees. *Alyeska Pipeline Co* v. *Wilderness Society*, *supra*, 421 U. S., at 260 & n. 33 (collecting statutes). Nonetheless, Summit Valley argues that § 303 does specifically authorize a District Court to award attorney's fees incurred for the purpose of terminating the union's illegal secondary activity by providing for the recovery of "damages" resulting from this activity. Because attorney's fees expended to compel "resumption of work in effect take the place of other compensable damages which would continue to be suffered if work were not resumed," petitioner asserts that such fees are part of the damages caused by the Union's illegal activity. Brief for Petitioner 13, quoting *Associated General Contractors* v. *Construction and General Laborers, Local 563*, 612 F. 2d 1060, 1063–1064 (1979).

In assessing petitioner's interpretation of the word "damages" in § 303(b), we begin with the "fundamental canon of statutory construction . . . that, unless otherwise defined, words will be interpreted as taking their ordinary, contemporary, common meaning." *Perrin* v. *United States*, 444 U. S. 37, 42 (1979); *Burns* v. *Alcala*, 420 U. S. 575, 580–581 (1975). Ordinarily a statutory right to "damages" does not include an implicit authorization to award attorney's fees. Indeed, the

American Rule presumes that the word "damages" means damages exclusive of fees. See, *e. g., Arcambel* v. *Wiseman, supra*; *Day* v. *Woodworth*, 13 How. 363 (1851); cf *Teamsters* v. *Morton*, 377 U. S. 252, 260 n. 15 (1964). Thus, petitioner's claim can succeed only if an examination of the relevant legislative history demonstrates that Congress intended to give a broader than normal scope to the term "damages."

Our review of the legislative history to § 303 reveals no such intention. To the contrary, the little discussion pertaining to the scope of an employer's recovery under § 303(b) indicates that Congress did not intend to expand the term "damages" to include attorney's fees. The following colloquy between Senator Taft and Senator Morse is particularly instructive. In response to Senator Morse's suggestion that § 303(b) would impose virtually unlimited liability on unions, Senator Taft stated that "[u]nder the Sherman Act the same question of boycott damage is subject to a suit for damages and attorney's fees. In this case *we simply provide for the amount of the actual damages*." 93 Cong. Rec. 4872–4873 (emphasis added). We find these remarks persuasive evidence that Congress did not intend to include attorney's fees, which were expended to terminate a union from engaging in illegal activity to be recovered as "damages" under § 303(b).[2]

In this respect, petitioner's claim is analogus to that presented in *Teamsters* v. *Morton*, 377 U. S. 252 (1964). In *Teamsters*, this Court reviewed the history and policies underlying § 303 in order to determine whether that provision authorized an award of punitive damages. Relying on the same colloquy quoted above, we concluded that "recovery for an employer's business losses caused by a union's peaceful secondary activity proscribed by § 303 should be limited to actual, compensatory damages." *Id.*, at 260. As we have often noted, one of the primary justifications for the American Rule is that "one should not be *penalized* for merely defending or prosecuting a lawsuit." *Fleischmann Distilling Corp.* v. *Maier Brewing Co.*, 386 U. S. 714, 718 (1967) (emphasis added). See also, *F.D. Rich Co.* v. *United States ex rel Industrial Lumber Co.*, 417 U. S. 116, 129 (1974); *Farmer* v. *Arabian American Oil Co.*, 379 U. S. 227, 235 (1964). The congressional intention discerned in *Teamsters* to limit recovery to actual, compensatory damages, counsels against reading the word damages to include attorney's fees incurred during prior Board proceedings.

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[2] Of course, these remarks are not conclusive. It is possible that Senator Taft's remarks may have been confined to a rejection of the recovery of attorney's fees expended during the § 303 proceeding itself. See *Mead* v. *Retail Clerks International Association*, 523 F. 2d, at 1380 (CA5 1975).

Nevertheless Summit Valley contends that allowing it to recover reasonable attorney's fees incurred during Board proceedings furthers the statutory intent to protect employers from the adverse effects of a union's illegal secondary activity. We agree that Congress was concerned about protecting employers from injury arising out of this type of activity when it enacted § 303. See generally S. Rep. No. 105, 80th Cong., 1st Sess., p. 54–55 (1947), 1 Legislative History of the LMRA 460–461 (1947) (Leg. His); 93 Cong. Rec. 5060, 2 Leg. His. 1371 (remarks of Sen. Taft). However, we fail to see why this interest cannot be adequately protected by the award of compensatory damages for the business losses resulting from the union's prohibited conduct.

Ultimately, petitioner's argument rests on the assumption that "Congress plainly intended Section 303 to be *fully* remedial and to restore to the victimized employer *all losses* caused by the illegal activity." Brief for Petitioner 23 (emphasis added). Even assuming that attorney's fees are necessary to achieve full compensation, this justification alone is not sufficient to create an exception to the American Rule in the absence of express Congressional authority. See *F.D. Rich Co.* v. *United States ex rel Industrial Lumber Co.*, 417 U. S. 116, 128–129 (1974). In *F.D. Rich*, this Court rejected the argument that attorney's fees should be awarded under the Miller Act, 49 Stat. 793, as amended, 80 Stat. 1139, 40 U. S. C. § 270a *et seq.*, because the Act provided for recovery of "sums justly due," 40 U. S. C. § 270b(a), and, unless fees were awarded, the legislative intent in favor of full compensation would be frustrated. *Id.*, at 128.

In squarely rejecting this claim, we found it to be nothing more than a "restate[ment] of one of the oft-repeated criticisms of the American Rule." *Ibid.* Although this Court acknowledged that "there is some force to the argument that a party who must bear the cost of his attorneys' fees out of his recovery is not made whole," we concluded that the counterveiling considerations which support the American Rule argue against placing exclusive reliance on the need to provide full compensation. *Id.*, at 129. These considerations include the possible deterrent effect that fee shifting would have on poor litigants with meritorious claims, the time, expense, and difficulty of litigating the fee question, and the possibility that the principle of independent advocacy might be threatened by having "the earnings of the attorney flow from the pen of the judge before whom he argues." *Ibid.* These same considerations persuade us not to infer that Congress intended to authorize fee shifting in § 303 actions in order to fully compensate an employer for the "damages sustained by him" as a result of a union's illegal activity.

Furthermore, petitioner's analysis would authorize the recovery of attorney's fees in every case where the plaintiff has prevailed against the defendant in prior litigation involving the same issues. See *Mead* v. *Retail Clerks Local 839*, 523 F. 2d, at 1380.[3] Quite simply, anytime a plaintiff must resort to litigation to enjoin the defendant from engaging in illegal conduct, arguably the plaintiff has been injured in the amount of its attorney's fees spent to obtain the injunction. Under petitioner's analysis, each plaintiff could recover the costs of this prior litigation as part of its damages in any subsequent action involving the same conduct. Such a result, however, is clearly barred by our prior decisions. The American Rule precludes courts from awarding attorney's fees incurred during prior proceedings in the same case. See *Fleischmann Corp.* v. *Maier Brewing Co.*, 386 U. S. 714 (1967). Similarly, courts have uniformly concluded that "where an action based on the same wrongful act has been prosecuted by the plaintiff against the defendant to a successful issue, he can not in a subsequent action recover, as damages, his costs and expenses in the former action." *Ritter* v. *Ritter*, 381 Ill. 549, 555, 46 N.E. 2d 41, 44 (1943). See also *Flanders* v. *Tweed*, 15 Wall. 450 (1872); *Mead* v. *Retail Clerks Local 839*, 523 F. 2d, at 1380–1381; *Ritter* v. *Ritter*, 381 Ill., at 557, 46 N.E. 2d, at 45 (collecting cases).

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[3] The rationale of petitioner's position would seem to require that fees be awarded whenever a defendant's wrongful conduct requires a plaintiff to incur more litigation expenses, even if those expenses are incurred *in the same action.* Furthermore, because the District Court gave the

This rule is universally followed in order to avoid the endless stream of litigation that might ensue if sucessful litigants could recover their attorney's fees in subsequent actions: "immediately upon the entry of judgment the plaintiff would start another action against the defendant for his attorney fees and expenses incurred in obtaining the preceding judgment." *Id.*, at 555, 46 N.E. 2d at 44. Under petitioner's construction of § 303(b) the word "damages" would always encompass attorney's fees expended in prior litigation. In the absence of clear support for this construction in the language

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Board's findings collateral estoppel effect in the § 303 action, petitioner did not have to relitigate the question whether the Union had committed an unfair labor practice. In effect, Summit Valley is therefore asking for fees that it would have incurred in the § 303 action had it not first litigated the issues before the Board.

or the legislative history of § 303 we decline to adopt such a broad exception to the American Rule.

III

Attorney's fees incurred during prior Broad proceedings are not a proper element of damages under § 303(b) of the LMRA. Accordingly, The judgment of the Court of Appeals for the Ninth Circuit is

Affirmed.

981/81-534

(Slip Opinion)

NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D.C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

SUPREME COURT OF THE UNITED STATES

No. 81–534

JOHN O'DELL ET AL., PETITIONERS, *v.* ANDREW ESPINOZA, ETC., ET AL.,

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF COLORADO

[May 3, 1982]

PER CURIAM.

Under 28 U. S. C. § 1257, this Court has jurisdiction to review only "[f]inal judgments or decrees rendered by the highest court of a State in which a decision could be had." Because the Colorado Supreme Court remanded this case for trial, its decision is not final "as an effective determination of the litigation." *Market Street R. Co.* v. *Railroad Commission*, 324 U.S. 548, 551. Although there is a limited set of situations in which we have found finality as to the federal issue despite the ordering of further proceedings in the lower state courts, see *Cox Broadcasting Corp* v. *Cohn*, 420 U.S. 469, this case does not fit into any of those categories. We therefore dismiss for want of jurisdiction.

It is so ordered.

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981/81-535

(Slip Opinion)

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Lumber Co.*, 200 U. S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

UNITED STATES DEPARTMENT OF STATE ET AL. *v.* WASHINGTON POST CO.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 81-535. Argued March 31, 1982—Decided May 17, 1982

Respondent filed a request with petitioner United States Department of State under the Freedom of Information Act for documents indicating whether certain Iranian nationals held valid United States passports. The State Department denied the request on the ground that the requested information was exempt from disclosure under Exemption 6 of the Act, which provides that the Act's disclosure requirements do not apply to "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." Pending an ultimately unsuccessful administrative appeal, respondent brought an action in Federal District Court to enjoin petitioners from withholding the requested documents, and the court granted summary judgment for respondent. The Court of Appeals affirmed, holding that because the citizenship status of the individuals in question was less intimate than information normally contained in personnel and medical files, it was not contained in "similar files" within the meaning of Exemption 6, and that therefore there was no need to consider whether disclosure of the information would constitute a clearly unwarranted invasion of personal privacy.

Held: The citizenship information sought by respondent satisfies the "similar files" requirement of Exemption 6, and hence the State Department's denial of the request should have been sustained upon a showing that release of the information would constitute a clearly unwarranted invasion of personal privacy. Although Exemption 6's language sheds little light on what Congress meant by "similar files," the legislative history indicates that Congress did not mean to limit Exemption 6 to a narrow class of files containing only a discrete kind of personal information, but that "similar files" was to have a broad, rather than a narrow, meaning. Ex-

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emption 6's protection is not determined merely by the nature of the file containing the requested information, and its protection is not lost merely because an agency stores information about an individual in records other than "personnel" or "medical" files. Pp. 3–8.

—— U. S. App. D. C. ——, 647 F. 2d 197, reversed and remanded.

REHNQUIST, J., delivered the opinion of the Court, in which BURGER, C. J., and BRENNAN, WHITE, MARSHALL, BLACKMUN, POWELL, and STEVENS, JJ., joined. O'CONNOR, J., concurred in the judgment.

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SUPREME COURT OF THE UNITED STATES

No. 81-535

UNITED STATES DEPARTMENT OF STATE, ET AL., PETITIONERS v. THE WASHINGTON POST COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

[May 17, 1982]

JUSTICE REHNQUIST delivered the opinion of the Court.

In September, 1979, respondent Washington Post Company filed a request under the Freedom of Information Act (FOIA), 5 U. S. C. § 552, requesting certain documents from petitioner United States Department of State. The subject of the request was defined as "documents indicating whether Dr. Ali Behzadnia and Dr. Ibrahim Yazdi hold valid U. S. passports." App. 8. The request indicated that respondent would "accept any record held by the Passport Office indicating whether either of these persons is an American citizen." *Ibid.* At the time of the request, both Behzadnia and Yazdi were Iranian Nationals living in Iran.

The State Department denied respondent's request the following month, stating that release of the requested information "would be 'a clearly unwarranted invasion of [the] personal privacy' of these persons," App. 14 (quoting 5 U. S. C. § 552(b)(6)), and therefore was exempt from disclosure under Exemption 6 of the FOIA.[1] Denial of respondent's request was affirmed on appeal by the Department's Council on Classification Policy, which concluded that "the privacy interests to be protected are not incidental ones, but rather are such that they clearly outweigh any public interests which might be served by release of the requested information." *Id.*, at 22–23.

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[1] Exemption 6 provides that the disclosure requirements of the Freedom of Information Act do not apply to "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." 5 U. S. C. § 552(b)(6).

While pursuing the administrative appeal, respondent brought an action in the United States District Court for the District of Columbia to enjoin petitioners from withholding the requested documents. Both sides filed affidavits and motions for summary judgment. Petitioners' affidavit, from the Assistant Secretary of State for Near Eastern and South Asian Affairs, explained that both Behzadnia and Yazdi were prominent figures in Iran's Revolutionary Government and that compliance with respondent's request would "cause a real threat of physical harm" to both men.[2] The District

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[2] Petitioners' original affidavit stated:

"There is intense anti-American sentiment in Iran and several Iranian revolutionary leaders have been strongly critized in the press for their alleged ties to the United States. Any individual in Iran who is suspected of being an American citizen or of having American connections is looked upon with mistrust. An official of the Government of Iran who is reputed to be an American citizen would, in my opinion, be in physical danger from some of the revolutionary groups that are prone to violence.

. . . . .

It is the position of the Department of State that any statement at this time by the United States Government which could be construed or misconstrued to indicate that any Iranian public official is currently a United States citizen is likely to cause a real threat of physical harm to that person." Affidavit of Harold H. Saunders, January 14, 1980, App. 17.

The affidavit reported that Yazdi, who had previously held the position of Foreign Minister, was currently a member of the Revolutionary Council and was responsible for solving problems in various regions of Iran. It also indicated that Behzadnia had been a senior official in the Ministry of National Guidance, but that the State Department had not received any report of his activities in recent weeks. *Ibid.* A supplemental affidavit, executed three months after the first affidavit, stated that Yazdi had been elected to the Iranian National Assembly, but that the activities of

Court nonetheless granted respondent's motion for summary judgment.

Petitioners appealed, and the Court of Appeals for the District of Columbia Circuit affirmed. 647 F. 2d 197. As construed by the Court of Appeals, Exemption 6 permits the withholding of information only when two requirements have been met: first, the information must be contained in personnel, medical, or "similar" files, and second, the information must be of such a nature that its disclosure would constitute a clearly unwarranted invasion of personal privacy. *Id.*, at 198. Petitioners argued that the first requirement was satisfied because the information sought by respondent was contained in "similar files." The Court of Appeals disagreed, holding that the phrase "similar files" applies only to those records which contain information "'"of the same magnitude—as highly personal or as intimate in nature—as that at stake in personnel and medical records."'" *Id.*, at 198–199 (quoting *Simpson* v. *Vance*, 648 F. 2d 10, 13 (CADC 1980), in turn quoting *Board of Trade* v. *Commodity Futures Trading Commission*, 627 F. 2d 392, 398 (CADC 1980)). Because it found the citizenship status of Behzadnia and Yazdi to be less intimate than information normally contained in personnel and medical files, the Court of Appeals held that it was not contained in "similar files." Therefore, the Court of Appeals reasoned, there was no need to consider whether disclosure of the information would constitute a clearly unwarranted invasion of personal privacy; having failed to meet the first requirement of Exemption 6, the information had to be disclosed under the mandate of the FOIA. We granted certiorari to review the Court of Appeal's construction of the "similar files" language, and we now reverse.

The language of Exemption 6 sheds little light on what Congress meant by "similar files." Fortunately, the legisla-

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Behzadnia were still unreported. Supplemental Affidavit of Harold H. Saunders, April 22, 1980, App. 41.

tive history is somewhat more illuminating. The House and Senate Reports, although not defining the phrase "similar files," suggest that Congress' primary purpose in enacting Exemption 6 was to protect individuals from the injury and embarassment that can result from the unnecessary disclosure of personal information. After referring to the "great quantities of [federal government] files containing intimate details about millions of citizens," the House Report explains that the exemption is "general" in nature and seeks to protect individuals:

> "A *general exemption* for [this] category of information is much more practical than separate statutes protecting each type of personal record. The limitation of a 'clearly unwarranted invasion of personal privacy' provides a proper balance between the protection of an individual's right of privacy and the preservation of the public's right to Government information *by excluding those kinds of files the disclosure of which might harm the individual.*" H.R. Rep. No. 1497, 89th Cong., 2nd Sess. 11 (1966) (emphasis added).

Similarly, the Senate Judiciary Committee reached a "consensus that these [personal] files should not be opened to the public, and . . . decided upon a *general exemption* rather than a number of specific statutory authorizations for various agencies." S. Rep. No. 813, 89th Cong., 1st Sess. 9 (1965) (emphasis added). The Committee concluded that the balancing of private against public interests, not the nature of the files in which the information was contained, should limit the scope of the exemption: "It is believed that the scope of the exemption is held within bounds by the use of the limitation of 'a clearly unwarranted invasion of personal privacy.'" *Ibid.* Thus, "the primary concern of Congress in drafting Exemption 6 was to provide for the confidentiality of personal matters." *Department of the Air Force* v. *Rose*, 425 U. S. 352, 375, n. 14 (1976).

Respondent relies upon passing references in the legislative history to argue that the phrase "similar files" does not include all files which contain information about particular individuals, but instead is limited to files containing "intimate details" and "highly personal" information. See H.R. Rep. No. 1497, *supra*, at 11; S. Rep. No. 813, *supra*, at 9. We disagree. Passing references and isolated phrases are not controlling when analyzing a legislative history. Congress' statements that it was creating a "general exemption" for information contained in "great quantities of files," H.R. Rep. No. 1497, *supra*, at 11, suggest that the phrase "similar files" was to have a broad, rather than a narrow, meaning. This impression is confirmed by the frequent characterization of the "clearly unwarranted invasion of personal privacy" language as a "limitation" which holds Exemption 6 "within bounds." S. Rep. No. 813, *supra*, at 9. See also, H.R. Rep. No. 1497, *supra*, at 11; S. Rep. No. 1219, 88th Cong., 2d Sess. 14 (1964). Had the words "similar files" been intended to be only a narrow addition to "personnel and medical files," there would seem to be no reason for concern about the exemption's being "held within bounds," and there surely would be clear suggestions in the legislative history that such a narrow meaning was intended. We have found none.

A proper analysis of the exemption must also take into account the fact that "personnel and medical files," the two benchmarks for measuring the term "similar files," are likely to contain much information about a particular individual that is not intimate. Information such as place of birth, date of birth, date of marriage, employment history, and comparable data is not normally regarded as highly personal, and yet respondent does not disagree that such information, if contained in a "personnel" or "medical" file, would be exempt from any disclosure that would constitute a clearly unwarranted invasion of personal privacy. The passport information here requested, if it exists, presumably would be found in files containing much of the same kind of information.

Such files would contain at least the information that normally is required from a passport applicant. See 22 U. S. C. § 213. It strains the normal meaning of the word to say that such files are not "similar" to personnel or medical files.

We agree with petitioners' argument that adoption of respondent's limited view of Exemption 6 would produce anomalous results. Under the plain language of the exemption, non-intimate information about a particular individual which happens to be contained in a personnel or medical file can be withheld if its release would constitute a clearly unwarranted invasion of personal privacy. And yet under respondent's view of the exemption, the very same information, being non-intimate and therefore not within the "similar files" language, would be subject to mandatory disclosure if it happened to be contained in records other than personnel or medical files. "[T]he protection of an individual's right of privacy" which Congress sought to achieve by preventing "the disclosure of [information] which might harm the individual," H.R. Rep. No. 1497, *supra*, at 11, surely was not intended to turn upon the label of the file which contains the damaging information. In *Department of the Air Force* v. *Rose*, 425 U. S., at 372, we recognized that the protection of Exemption 6 is not determined merely by the nature of the file in which the requested information is contained:

> "Congressional concern for the protection of the kind of confidential personal data usually included in a personnel file is abundantly clear. But Congress also made clear that nonconfidential matter was not to be insulated from disclosure merely because it was stored by an agency in 'personnel' files."

By the same reasoning, information about an individual should not lose the protection of Exemption 6 merely because it is stored by an agency in records other than "personnel" or "medical" files.

In sum, we do not think that Congress meant to limit Exemption 6 to a narrow class of files containing only a discrete kind of personal information. Rather, "[t]he exemption [was] intended to cover detailed Government records on an individual which can be identified as applying to that individual." H.R. Rep. No. 1497, *supra*, at 11.[3] When disclosure of information which applies to a particular individual is sought from government records, courts must determine whether release of the information would constitute a clearly unwarranted invasion of that person's privacy.[4]

The citizenship information sought by respondent satisfies the "similar files" requirement of Exemption 6, and petitioners' denial of the request should have been sustained upon a showing by the government that release of the information would constitute a clearly unwarranted invasion of personal privacy.[5] The Court of Appeals expressly declined to consider the effect of disclosure upon the privacy interests of Behzadnia and Yazdi, and we think that such balancing should be left to the Court of Appeals or to the District Court on remand. The judgment of the Court of Appeals is reversed, and the case remanded for further proceedings consistent with this opinion.

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[3] This view of Exemption 6 was adopted by the Attorney General shortly after enactment of the FOIA in a memorandum explaining the meaning of the Act to various federal agencies:

"It is apparent that the exemption is intended to exclude from the disclosure requirements all personnel and medical files, *and all private or personal information contained in other files* which, if disclosed to the public, would amount to a clearly unwarranted invasion of the privacy of any person." Attorney General's Memorandum on the Public Information Section of the Administrative Procedure Act 36 (1967) (emphasis added).

[4] This construction of Exemption 6 will not render meaningless the threshold requirement that information be contained in personnel, medical, and similar files by reducing it to a test which fails to screen out any information that will not be screened out by the balancing of private against public interests. As petitioners point out, there are undoubtedly many government files which contain information not personal to any particular individual, the disclosure of which would nonetheless cause embarassment to certain persons. Information unrelated to any particular person presumably would not satisfy the threshold test.

[5] In holding that "similar files" are limited to those containing intimate details about individuals such as might also be contained in personnel or medical files, the Court of Appeals relied on its decision in *Simpson* v. *Vance*, 648 F. 2d 10 (1980). In *Simpson*, the Court of Appeals held that portions of the State Department's *Biographical Register* could not be considered a "similar file" because such information was currently available to the public. *Id.*, at 15. At the same time, *Simpson* held that release of

It is so ordered.

JUSTICE O'CONNOR concurs in the judgment.

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information pertaining to an individual's marital status and the name of the individual's spouse "would not be appropriate." *Id.*, at 17. Respondent contends that information concerning the citizenship of Behzadnia and Yazdi likewise cannot be withheld as contained in "similar files" because United States citizenship is a matter of public record.

Even under the Court of Appeals' holding in *Simpson*, however, the fact that citizenship is a matter of public record somewhere in the nation cannot be decisive, since it would seem almost certain that the information concerning marital status that was withheld in *Simpson* would likewise be contained in public records. In addition, "personnel" files, which expressly come within Exemption 6, are likely to contain much information that is equally a matter of public record. Place of birth, date of birth, marital status, past criminal convictions, and acquisition of citizenship are some examples. The public nature of information may be a reason to conclude, under all the circumstances of a given case, that the release of such information would not constitute a "clearly unwarranted invasion of personal privacy," but it does not militate against a conclusion that files are "similar" to personnel and medical files.

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981 / 81-574

(Slip Opinion)

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Lumber Co.*, 200 U. S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

GENERAL TELEPHONE COMPANY OF THE SOUTHWEST *v.* FALCON

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 81–574. Argued April 26, 1982—Decided June 14, 1982

After being denied a promotion by petitioner employer, respondent Mexican-American filed a charge with the Equal Employment Opportunity Commission, alleging that he had been passed over for promotion because of his national origin and that petitioner's promotion policy operated against Mexican-Americans as a class. Subsequently, respondent received a right-to-sue letter from the Commission, and he then brought a class action in Federal District Court under Title VII of the Civil Rights Act of 1964. Without conducting an evidentiary hearing, the District Court certified a class consisting of Mexican-American employees of petitioner and Mexican-American applicants who had not been hired. As to liability, the court held that petitioner had discriminated against respondent in its promotion practices but not in its hiring practices, and with respect to the class found that petitioner had discriminated against Mexican-Americans in its hiring practices but not in its promotion practices. Both parties appealed, and the Court of Appeals, rejecting petitioner's argument that the class had been defined too broadly, held that the District Court's class certification was proper under the Fifth Circuit's rule permitting any victim of racial discrimination in employment to maintain an "across-the-board" attack on all unequal employment practices allegedly followed by the employer pursuant to a policy of racial discrimination. On the merits, the Court of Appeals upheld respondent's promotion claim, but held that the District Court's findings were insufficient to support recovery on behalf of the class. Subsequently, this Court vacated the Court of Appeals' judgment and remanded the case for further consideration in light of *Texas Dept. of Community Affairs* v. *Burdine*, 450 U. S. 248. The Court of Appeals then vacated its judgment as to respondent's promotion claim but reinstated its approval of the District Court's class certification.

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Held: The District Court erred in permitting respondent to maintain a class action on behalf of both employees who were denied promotion and applicants who were denied employment. Pp. 7–13.

An individual litigant seeking to maintain a class action under Title VII must meet Federal Rule of Civil Procedure 23(a)'s specified "prerequisites of numerosity, commonality, typicality, and adequacy of representation."*General Telephone Co.* v. *EEOC*, 446 U. S. 318, 330. These requirements effectively "limit the class claims to those fairly encompassed by the named plaintiff's claim." *Ibid.* Pp. 7–9.

(b) There can be no disagreement with the proposition underlying the Fifth Circuit's "across-the-board" rule—that racial discrimination is by definition class discrimination. But the allegation that such discrimination has occurred neither determines whether a class action may be maintained in accordance with Rule 23 nor determines the class that may be certified. Here, to bridge the gap between respondent's promotion claim and the existence of a class of persons who have suffered the same injury as respondent—so that respondent's claim and the class claims share common questions of law or fact and respondent's claim is typical of the class claims—respondent must prove much more than the validity of his own claim. Respondent's complaint provided an insufficient basis for concluding that the adjudication of his claim would require the decision of any common question concerning petitioner's failure to hire more Mexican-Americans. Without any specific presentation identifying the questions of law or fact that were common to the claims of respondent and of the class members he sought to represent, it was error for the District Court to presume that respondent's claim was typical of other claims against petitioner by Mexican-American employees and applicants. Pp. 9–11.

(c) As the District Court's bifurcated findings on liability demonstrate, the individual and class claims might as well have been tried separately. Thus, it is clear that the maintenance of the action as a class action did not advance "the efficiency and economy of litigation which is a principal purpose of the procedure." *American Pipe & Construction Co.* v. *Utah*, 414 U. S. 538, 553. Pp. 11–12.

(d) The District Court's error, and the error inherent in the "across-the-board" rule, is the failure to evaluate carefully the legitimacy of the named plaintiff's plea that he is a proper class representative under Rule 23(a). P. 12.

647 F. 2d 633, reversed and remanded.

STEVENS, J., delivered the opinion of the Court, in which BRENNAN, WHITE, MARSHALL, BLACKMUN, POWELL, REHNQUIST, and O'CONNOR, JJ., joined. BURGER, C. J., filed an opinion concurring in part and dissenting in part.

[illegible]

[illegible] reversed and remanded.

[illegible]

NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D.C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

SUPREME COURT OF THE UNITED STATES

No. 81-574

GENERAL TELEPHONE COMPANY OF THE SOUTHWEST, PETITIONER *v.* MARIANO S. FALCON

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

[June 14, 1982]

JUSTICE STEVENS delivered the opinion of the Court.

The question presented is whether respondent Falcon, who complained that petitioner did not promote him because he is a Mexican-American, was properly permitted to maintain a class action on behalf of Mexican-American applicants for employment whom petitioner did not hire.

I

In 1969 petitioner initiated a special recruitment and training program for minorities. Through that program, respondent Falcon was hired in July 1969 as a groundman, and within a year he was twice promoted, first to lineman and then to lineman-in-charge. He subsequently refused a promotion to installer-repairman. In October 1972 he applied for the job of field inspector; his application was denied even though the promotion was granted several white employees with less seniority.

Falcon thereupon filed a charge with the Equal Employment Opportunity Commission stating his belief that he had been passed over for promotion because of his national origin and that petitioner's promotion policy operated against Mexican-Americans as a class. 626 F. 2d 369, 372, n. 2 (CA5 1980). In due course he received a right to sue letter from the Commission and, in April 1975, he commenced this action under Title VII of the Civil Rights Act of 1964, 74 Stat. 253, as amended, 42 U. S. C. § 2000e *et seq.*, in the United States District Court for the Northern District of Texas. His complaint alleged that petitioner maintained "a policy, practice, custom, or usage of: (a) discriminating against [Mexican-Americans] because of national origin and with respect to compensation, terms, conditions, and privileges of employment, and (b) . . . subjecting [Mexican-Americans] to continuous employment discrimination."[1] Respondent claimed that as a result of this policy whites with less qualification and experience and lower evaluation scores than respondent had been promoted more rapidly. The complaint contained no factual allegations concerning petitioner's hiring practices.

Respondent brought the action "on his own behalf and on behalf of other persons similarly situated, pursuant to Rule 23(b)(2) of the Federal Rules of Civil Procedure."[2] The

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[1] App. 14. In paragraph VI of the complaint, respondent alleged:

"The Defendant has established an employment, transfer, promotional, and seniority system, the design, intent, and purpose of which is to continue and preserve, and which has the effect of continuing and preserving, the Defendant's policy, practice, custom and usage of limiting the employment, transfer, and promotional opportunities of Mexican-American employees of the company because of national origin." *Id.*, at 15.

[2] *Id.*, at 13. Rule 23 provides, in part:

"(a) Prerequisites to a Class Action. One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

"(b) Class Actions Maintainable. An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:

. . . .

"(2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injuncclass identified in the complaint was "composed of Mexican-American persons who are employed, or who might be employed, by GENERAL TELEPHONE COMPANY at its place of business located in Irving, Texas, who have been and who continue to be or might be adversely affected by the practices complained of herein."[3]

After responding to petitioner's written interrogatories,[4] respondent filed a memorandum in favor of certification of "the class of all hourly Mexican American employees who have been employed, are employed, or may in the future be employed and all those Mexican Americans who have applied or would have applied for employment had the Defendant not practiced racial discrimination in its employment practices."

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tive relief or corresponding declaratory relief with respect to the class as a whole. . . ."

[3] App. 13–14. The paragraph of the complaint in which respondent alleged conformance with the requirements of Rule 23 continued:

"There are common questions of law and fact affecting the rights of the members of this class who are, and who continue to be, limited, classified, and discriminated against in ways which deprive and/or tend to deprive them of equal employment opportunities and which otherwise adversely affect their status as employees because of national origin. These persons are so numerous that joinder of all members is impracticable. A common relief is sought. The interests of said class are adequately represented by Plaintiff. Defendant has acted or refused to act on grounds generally applicable to the Plaintiff." *Id.*, at 14.

[4] Petitioner's Interrogatory No. 8 stated:

"Identify the common questions of law and fact which affect the rights of the members of the purported class." *Id.*, at 26.

Respondent answered that interrogatory as follows:

"The facts which affect the rights of the members of the class are the facts of their employment, the ways in which evaluations are made, the subjective rather than objective manner in which recommendations for raises and transfers and promotions are handled, and all of the facts surrounding the employment of Mexican-American persons by General Telephone Company. The questions of law specified in Interrogatory No. 8 call for a conclusion on the part of the Plaintiff." *Id.*, at 34.

App. 46–47. His position was supported by the ruling of the United States Court of Appeals for the Fifth Circuit in *Johnson* v. *Georgia Highway Express, Inc.*, 417 F. 2d 1122 (1969), that any victim of racial discrimination in employment may maintain an "across the board" attack on all unequal employment practices alleged to have been committed by the employer pursuant to a policy of racial discrimination. Without conducting an evidentiary hearing, the District Court certified a class including Mexican-American employees and Mexican-American applicants for employment who had not been hired.[5]

Following trial of the liability issues, the District Court entered separate findings of fact and conclusions of law with respect first to respondent and then to the class. The District Court found that petitioner had not discriminated against respondent in hiring, but that it did discriminate against him in its promotion practices. App. to Pet. for Cert. 35a, 37a. The court reached converse conclusions about the class, finding no discrimination in promotion practices, but concluding that petitioner had discriminated against Mexican-Americans at its Irving facility in its hiring practices. *Id.*, at 39a–40a.[6]

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[5] The District Court's pretrial order of February 2, 1976, provided, in part:

"The case is to proceed as a class action and the Plaintiff is to represent the class. The class is to be made up of those employees who are employed and employees who have applied for employment in the Irving Division of the Defendant company, and no other division.

. . . . .

"Plaintiff and Defendant are to hold further negotiations to see if there is a possibility of granting individual relief to the Plaintiff, MARIANO S. FALCON." App. to Pet. for Cert. 48a–49a.

The District Court denied subsequent motions to decertify the class both before and after the trial.

[6] The District Court ordered petitioner to accelerate its affirmative action plan by taking specified steps to more actively recruit and promote Mexican-Americans at its Irving facility. See *id.*, at 41a–45a.

After various post-trial proceedings, the District Court ordered petitioner to furnish respondent with a list of all Mexican-Americans who had applied for employment at the Irving facility during the period between January 1, 1973, and October 18, 1976. Respondent was then ordered to give notice to those persons advising them that they might be entitled to some form of recovery. Evidence was taken concerning the applicants who responded to the notice and backpay was ultimately awarded to 13 persons, in addition to respondent Falcon. The total recovery by respondent and the entire class amounted to $67,925.49, plus costs and interest.[7]

Both parties appealed. The Court of Appeals rejected respondent's contention that the class should have encompassed all of petitioner's operations in Texas, New Mexico, Oklahoma, and Arkansas.[8] On the other hand, the court also rejected petitioner's argument that the class had been defined too broadly. For, under the Fifth Circuit's across-the-board rule, it is permissible for "an employee complaining of one employment practice to represent another complaining of another practice, if the plaintiff and the members of the class suffer from essentially the same injury. In this case, all of the claims are based on discrimination because of national origin." *Id.*, at 375.[9] The court relied on *Payne* v.

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[7] Respondent's individual recovery amounted to $1,040.33. A large share of the class award, $28,827.50, represented attorneys' fees. Most of the remainder resulted from petitioner's practice of keeping all applications active for only 90 days; the District Court found that most of the applications had been properly rejected at the time they were considered, but that petitioner could not justify the refusal to extend employment to disappointed applicants after an interval of 90 days. See 463 F.Supp. 315 (ND Tex. 1978).

[8] The Court of Appeals held that the District Court had not abused its discretion since each of petitioner's divisions conducted its own hiring and since management of the broader class would be much more difficult. 626 F. 2d, at 376.

[9] The court continued:

Travenol Laboratories, Inc., 565 F. 2d 895 (1978), cert. denied, 439 U. S. 835, in which the Fifth Circuit stated:

> "Plaintiffs' action is an 'across the board' attack on unequal employment practices alleged to have been committed by Travenol pursuant to a policy of racial discrimination. As parties who have allegedly been aggrieved by some of these discriminatory practices, plaintiffs have demonstrated a sufficient nexus to enable them to represent other class members suffering from different practices motivated by the same policies." *Id.*, at 900, quoted in 626 F. 2d, at 375.

On the merits, the Court of Appeals upheld respondent's claim of disparate treatment in promotion,[10] but held that the

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"While similarities of sex, race or national origin claims are not dispositive in favor of finding that the prerequisites of Rule 23 have been met, they are an extremely important factor in the determination, that can outweigh the fact that the members of the plaintiff class may be complaining about somewhat different specific discriminatory practices. In addition here, the plaintiff showed more than an alliance based simply on the same type of discriminatory claim. He also showed a similarity of interests based on job location, job function and other considerations." 626 F. 2d, at 375–376 (citations omitted).

The court did not explain how job location, job function, and the unidentified other considerations were relevant to the Rule 23(a) determination.

[10] The District Court found that petitioner's proffered reasons for promoting the whites, rather than respondent, were insufficient and subjective. The Court of Appeals held that respondent had made out a prima facie case under the test set forth in *McDonnell Douglas Corp.* v. *Green*, 411 U. S. 792, 802, and that the District Court's conclusion that petitioner had not rebutted that prima facie case was not clearly erroneous. In so holding, the Court of Appeals relied on its earlier opinion in *Burdine* v. *Texas Department of Community Affairs*, 608 F. 2d 563 (1979). Our opinion in *Burdine* had not yet been announced.

The Court of Appeals disposed of a number of other contentions raised by both parties, and reserved others pending the further proceedings before the District Court on remand. Among the latter issues was petitioner's objection to the District Court's theory for computing the class

District Court's findings relating to disparate impact in hiring were insufficient to support recovery on behalf of the class.[11] After this Court decided *Texas Department of Community Affairs* v. *Burdine*, 450 U. S. 248, we vacated the judgment of the Court of Appeals and directed further consideration in the light of that opinion. 450 U. S. 1036. The Fifth Circuit thereupon vacated the portion of its opinion addressing respondent's promotion claim but reinstated the portions of its opinion approving the District Court's class certification. App. to Pet. for Cert. 1a–3a. With the merits of both respondent's promotion claim and the class hiring claims remaining open for reconsideration in the District Court on remand, we granted certiorari to decide whether the class action was properly maintained on behalf of both employees who were denied promotion and applicants who were denied employment.

II

The class action device was designed as "an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only." *Califano* v. *Yamasaki*, 442 U. S. 682, 700–701. Class relief is "peculiarly appropriate" when the "issues involved are common to the class as a whole" and when they "turn on questions of law applicable in the same manner to each member of the class." *Id.*, at 701. For in such cases, "the class-action device saves the re-

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backpay awards. See n. 7, *supra*.

[11] The District Court's finding was based on statistical evidence comparing the number of Mexican-Americans in the company's employ, and the number hired in 1972 and 1973, with the percentage of Mexican-Americans in the Dallas-Fort Worth labor force. See App. to Pet. for Cert. 39a. Since recovery had been allowed for the years 1973 through 1976 based on statistical evidence pertaining to only a portion of that period, and since petitioner's evidence concerning the entire period suggested that there was no disparate impact, the Court of Appeals ordered further proceedings on the class hiring claims. 626 F. 2d, at 380–382.

sources of both the courts and the parties by permitting an issue potentially affecting every [class member] to be litigated in an economical fashion under Rule 23." *Ibid.*

Title VII of the Civil Rights Act of 1964, as amended, authorizes the Equal Employment Opportunity Commission to sue in its own name to secure relief for individuals aggrieved by discriminatory practices forbidden by the Act. See 42 U. S. C. §2000e–5(f)(1). In exercising this enforcement power, the Commission may seek relief for groups of employees or applicants for employment without complying with the strictures of Rule 23. *General Telephone Co.* v. *EEOC*, 446 U. S. 318. Title VII, however, contains no special authorization for class suits maintained by private parties. An individual litigant seeking to maintain a class action under Title VII must meet "the prerequisites of numerosity, commonality, typicality, and adequacy of representation" specified in Rule 23(a). *Id.*, at 330. These requirements effectively "limit the class claims to those fairly encompassed by the named plaintiff's claims." *Ibid.*

We have repeatedly held that "a class representative must be part of the class and 'possess the same interest and suffer the same injury' as the class members." *East Texas Motor Freight System, Inc.* v. *Rodriguez*, 431 U. S. 395, 403 (quoting *Schlesinger* v. *Reservists Committee to Stop the War*, 418 U. S. 208, 216). In *East Texas Motor Freight*, a Title VII action brought by three Mexican-American city drivers, the Fifth Circuit certified a class consisting of the trucking company's black and Mexican-American city drivers allegedly denied on racial or ethnic grounds transfers to more desirable line-driver jobs. We held that the Court of Appeals had "plainly erred in declaring a class action." 431 U. S., at 403. Because at the time the class was certified it was clear that the named plaintiffs were not qualified for line-driver positions, "they could have suffered no injury as a result of the allegedly discriminatory practices, and they were, therefore, simply not eligible to represent a class of persons who did allegedly suffer injury." *Id.*, at 403–404.

Our holding in *East Texas Motor Freight* was limited; we noted that "a different case would be presented if the District Court had certified a class and only later had it appeared that the named plaintiffs were not class members or were otherwise inappropriate class representatives." *Id.*, at 406, n. 12. We also recognized the theory behind the Fifth Circuit's across-the-board rule, noting our awareness "that suits alleging racial or ethnic discrimination are often by their very nature class suits, involving classwide wrongs," and that "[c]ommon questions of law or fact are typically present." *Id.*, at 405. In the same breath, however, we reiterated that "careful attention to the requirements of Fed. Rule Civ. Proc. 23 remains nonetheless indispensable" and that the "mere fact that a complaint alleges racial or ethnic discrimination does not in itself ensure that the party who has brought the lawsuit will be an adequate representative of those who may have been the real victims of that discrimination." *Id.*, at 405–406.

We cannot disagree with the proposition underlying the across-the-board rule—that racial discrimination is by definition class discrimination.[12] But the allegation that such discrimination has occurred neither determines whether a class action may be maintained in accordance with Rule 23 nor defines the class that may be certified. Conceptually, there is a wide gap between (a) an individual's claim that he has been denied a promotion on discriminatory grounds, and his otherwise unsupported allegation that the company has a policy of discrimination, and (b) the existence of a class of persons who have suffered the same injury as that individual, such that the individual's claim and the class claims will share common questions of law or fact and that the individual's claim will be typical of the class claims.[13] For respondent to bridge that gap, he must prove much more than the validity of his own claim. Even though evidence that he was passed over for promotion when several less deserving whites were advanced may support the conclusion that respondent was denied the promotion because of his national origin, such evidence would not necessarily justify the additional inferences (1) that this discriminatory treatment is typical of petitioner's promotion practices, (2) that petitioner's promotion practices are motivated by a policy of ethnic discrimination that pervades petitioner's Irving division, or (3) that this policy of ethnic discrimination is reflected in petitioner's other employment practices, such as hiring, in the same way it is manifested in the promotion practices. These additional inferences demonstrate the tenuous character of any presumption that the class claims are "fairly encompassed" within respondent's claim.

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[12] See *Hall* v. *Werthan Bag Corp.*, 251 F.Supp. 184, 186 (MD Tenn. 1966).

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[13] The commonality and typicality requirements of Rule 23(a) tend to merge. Both serve as guideposts for determining whether under the particular circumstances maintenance of a class action is economical and whether the named plaintiff's claim and the class claims are so interrelated that the interests of the class members will be fairly and adequately protected in their absence. Those requirements therefore also tend to merge with the adequacy-of-representation requirement, although the latter requirement also raises concerns about the competency of class counsel and conflicts of interest. In this case, we need not address petitioner's argument that there is a conflict of interest between respondent and the class of rejected applicants because an enlargement of the pool of Mexican-American employees will decrease respondent's chances for promotion. See *General Telephone Co.* v. *EEOC*, 446 U. S. 318, 331 ("In employment discrimination litigation, conflicts might arise, for example, between employees and applicants who were denied employment and who will, if granted relief, compete with employees for fringe benefits or seniority. Under Rule 23, the same plaintiff could not represent these classes."); see also *East Texas Motor Freight System, Inc.* v. *Rodriguez*, 431 U. S. 395, 404-405.

Respondent's complaint provided an insufficient basis for concluding that the adjudication of his claim of discrimination in promotion would require the decision of any common question concerning the failure of petitioner to hire more Mexican-Americans. Without any specific presentation identifying the questions of law or fact that were common to the claims of respondent and of the members of the class he sought to represent,[14] it was error for the District Court to presume that respondent's claim was typical of other claims against petitioner by Mexican-American employees and applicants. If one allegation of specific discriminatory treatment were sufficient to support an across-the-board attack, every Title VII case would be a potential company-wide class action. We find nothing in the statute to indicate that Congress intended to authorize such a wholesale expansion of class-action litigation.[15]

The trial of this class action followed a predictable course. Instead of raising common questions of law or fact, respondent's evidentiary approaches to the individual and class claims were entirely different. He attempted to sustain his individual claim by proving intentional discrimination. He tried to prove the class claims through statistical evidence of disparate impact. Ironically, the District Court rejected the class claim of promotion discrimination, which conceptually might have borne a closer typicality and commonality relationship with respondent's individual claim, but sustained the class claim of hiring discrimination. As the District Court's bifurcated findings on liability demonstrate, the individual and class claims might as well have been tried separately. It is clear that the maintenance of respondent's action as a class action did not advance "the efficiency and economy of litigation which is a principal purpose of the procedure." *American Pipe & Construction Co.* v. *Utah*, 414 U. S. 538, 553.

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[14] See n. 4, *supra*.

[15] If petitioner used a biased testing procedure to evaluate both applicants for employment and incumbent employees, a class action on behalf of every applicant or employee who might have been prejudiced by the test clearly would satisfy the commonality and typicality requirements of Rule 23(a). Significant proof that an employer operated under a general policy of discrimination conceivably could justify a class of both applicants and employees if the discrimination manifested itself in hiring and promotion practices in the same general fashion, such as through entirely subjective decisionmaking processes. In this regard it is noteworthy that Title VII prohibits discriminatory employment *practices*, not an abstract policy of discrimination. The mere fact that an aggrieved private plaintiff is a member of an identifiable class of persons of the same race or national origin is insufficient to establish his standing to litigate on their behalf all possible claims of discrimination against a common employer.

We do not, of course, judge the propriety of a class certification by hindsight. The District Court's error in this case, and the error inherent in the across-the-board rule, is the failure to evaluate carefully the legitimacy of the named plaintiff's plea that he is a proper class representative under Rule 23(a). As we noted in *Coopers & Lybrand* v. *Livesay*, 437 U. S. 463, "the class determination generally involves considerations that are 'enmeshed in the factual and legal issues comprising the plaintiff's cause of action.'" *Id.*, at 469 (quoting *Mercantile Nat. Bank* v. *Langdeau*, 371 U. S. 555, 558). Sometimes the issues are plain enough from the pleadings to determine whether the interests of the absent parties are fairly encompassed within the named plaintiff's claim, and sometimes it may be necessary for the court to probe behind the pleadings before coming to rest on the certification question. Even after a certification order is entered, the judge remains free to modify it in the light of subsequent developments in the litigation.[16] For such an order, particularly during the period before any notice is sent to members of the class, "is inherently tentative." 437 U. S., at 469, n. 11. This flexibility enhances the usefulness of the class-action device; actual, not presumed, conformance with Rule 23(a) remains, however, indispensable.

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[16] "As soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained. An order under this subdivision may be conditional, and may be altered or amended before the decision on the merits." Fed. Rule Civ. Proc. 23(c)(1).

III

The need to carefully apply the requirements of Rule 23(a) to Title VII class actions was noticed by a member of the Fifth Circuit panel that announced the across-the-board rule. In a specially concurring opinion in *Johnson* v. *Georgia Highway Express, Inc.*, *supra*, at 1125–1127, Judge Godbold emphasized the need for "more precise pleadings," *id.*, at 1125, for "without reasonable specificity the court cannot define the class, cannot determine whether the representation is adequate, and the employer does not know how to defend," *id.*, at 1126. He termed as "most significant" the potential unfairness to the class members bound by the judgment if the framing of the class is overbroad. *Ibid.* And he pointed out the error of the "tacit assumption" underlying the across-the-board rule that "all will be well for surely the plaintiff will win and manna will fall on all members of the class." *Id.*, at 1127. With the same concerns in mind, we reiterate today that a Title VII class action, like any other class action, may only be certified if the trial court is satisfied, after a rigorous analysis, that the prerequisites of Rule 23(a) have been satisfied.

The judgment of the Court of Appeals affirming the certification order is reversed and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

SUPREME COURT OF THE UNITED STATES

No. 81-574

GENERAL TELEPHONE COMPANY OF THE SOUTHWEST, PETITIONER *v.* MARIANO S. FALCON

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

[June 14, 1982]

CHIEF JUSTICE BURGER, concurring in part and dissenting in part.

I agree with the Court's decision insofar as it states the general principles which apply in determining whether a class should be certified in this case under Rule 23. However, in my view it is not necessary to remand for further proceedings since it is entirely clear on this record that no class should have been certified in this case. I would simply reverse the Court of Appeals with instructions to dismiss the class claim.

As the Court notes, the purpose of Rule 23 is to promote judicial economy by allowing for litigation of common questions of law and fact at one time. *Califano* v. *Yamasaki*, 442 U. S. 682, 701 (1979). We have stressed that strict attention to the requirements of Rule 23 is indispensable in employment discrimination cases. *East Texas Motor Freight System, Inc.* v. *Rodriguez*, 431 U. S. 395, 405–406 (1977). This means that class claims are limited to those "fairly encompassed by the named plaintiff's claims." *Ante* at 8; *General Telephone Co.* v. *EEOC*, 446 U. S. 318, 330 (1980).

Respondent claims that he was not promoted to a job as field inspector because he is a Mexican-American. To be successful in his claim, which he advances under the "disparate treatment" theory, he must convince a court that those who were promoted were promoted not because they were better qualified than he was, but, instead, that he was not promoted for discriminatory reasons. The success of this claim depends on evaluation of the comparative qualifications of the applicants for promotion to field inspector and on analysis of the credibility of the reasons for the promotion decisions provided by those who made the decisions. Respondent's class claim on behalf of unsuccessful applicants for jobs with petitioner, in contrast, is advanced under the "adverse impact" theory. Its success depends on an analysis of statistics concerning petitioner's hiring patterns.*

The record in this case clearly shows that there are no common questions of law or fact between respondent's claim and the class claim; the only commonality is that respondent is a Mexican-American and he seeks to represent a class of Mexican-Americans. See *ante*, 5–6 & n. 9. We have repeatedly held that the bare fact that a plaintiff alleges racial or ethnic discrimination is not enough to justify class certification. *Ante* at 9; *East Texas Motor Freight*, *supra*, 431 U. S., at 405–406. Accordingly, the class should not have been certified.

Moreover, while a judge's decision to certify a class is not normally to be evaluated by hindsight, *ante*, at 12, since the judge cannot know what the evidence will show, there is no reason for us at this stage of these lengthy judicial proceedings not to proceed in light of the evidence actually presented. The Court properly concludes that the Court of Appeals and the District Court failed to consider the requirements of Rule 23. In determining whether to reverse and remand or to simply reverse, we can and should look at the evidence. The record shows that there is no support for the class claim. Respondent's own statistics show that 7.7% of those hired by petitioner between 1972 and 1976 were Mexican-American while the relevant labor force was 5.2% Mexican-American. *Falcon* v. *General Telephone Company of the Southwest*, 626 F. 2d 369, 372, 381 n. 16. Petitioner's unchallenged evidence shows that it hired Mexican-Americans in numbers greater than their percentage of the labor force even though Mexican-Americans applied for jobs with petitioner in numbers smaller than their percentage of the labor force. *Id.*, at 373 n. 4. This negates any claim of Falcon as a class representative.

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*There is no allegation that those who made the hiring decisions are the same persons who determined who was promoted to field inspector. Thus there is no claim that the same person or persons who made the challenged decisions were motivated by prejudice against Mexican-Americans, and that this prejudice manifested itself in both the hiring decisions and the decisions not to promote respondent.

Like so many Title VII cases, this case has already gone on for years, draining judicial resources as well as resources of the litigants. Rather than promoting judicial economy, the "across-the-board" class action has promoted multiplication of claims and endless litigation. Since it is clear that the class claim brought on behalf of unsuccessful applicants for jobs with petitioner cannot succeed, I would simply reverse and remand with instructions to dismiss the class claim.

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All issues available have been filmed. Unfortunately, any scattered missing issues are no longer available.

981/81-611

(Slip Opinion)

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Lumber Co.*, 200 U. S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

GLOBE NEWSPAPER CO. *v.* SUPERIOR COURT FOR THE COUNTY OF NORFOLK

APPEAL FROM THE SUPREME JUDICIAL COURT OF MASSACHUSETTS

No. 81-611. Argued March 29, 1982—Decided June 23, 1982

Appellee Massachusetts trial court, relying on a Massachusetts statute providing for exclusion of the general public from trials of specified sexual offenses involving a victim under the age of 18, ordered the exclusion of the press and public from the courtroom during the trial of a defendant charged with rape of three minor girls. Appellant newspaper publisher challenged the exclusion order, and ultimately, after the trial had resulted in the defendant's acquittal, the Massachusetts Supreme Judicial Court construed the Massachusetts statute as requiring, under all circumstances, the exclusion of the press and public during the testimony of a minor victim in a sex-offense trial.

Held:

1. The fact that the exclusion order expired with completion of the trial at which the defendant was acquitted does not render the controversy moot within the meaning of Art. III. The controversy is "capable of repetition, yet evading review," since it can reasonably be assumed that appellant will someday be subjected to another order relying on the Massachusetts statute and since criminal trials are typically of short duration. Pp. 5–6.

2. The Massachusetts statute, as construed by the Massachusetts Supreme Judicial Court, violates the First Amendment as applied to the States through the Fourteenth Amendment. Pp. 6–10.

(a) To the extent that the First Amendment embraces a right of access to criminal trials, it is to ensure that the constitutionally protected "discussion of governmental affairs" is an informed one. The right of access to *criminal trials* in particular is properly afforded protection by the First Amendment both because such trials have historically been open to the press and public and because such right of access plays a par-

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ticularly significant role in the functioning of the judicial process and the government as a whole. Pp. 6–10.

(b) The right of access to criminal trials is not absolute, but the circumstances under which the press and public can be barred are limited. The State must show that denial of such right is necessitated by a compelling governmental interest and is narrowly tailored to serve that interest. P. 10.

3. The Massachusetts statute cannot be justified on the basis of either the State's interest in protecting minor victims of sex crimes from further trauma and embarrassment or its interest in encouraging such victims to come forward and testify in a truthful and credible manner. Pp. 10–14.

(a) Compelling as the first interest is, it does not justify a *mandatory* closure rule. Such interest could be just as well served by requiring the trial court to determine on a case-by-case basis whether the State's legitimate concern for the minor victim's well-being necessitates closure. Such an approach ensures that the constitutional right of the press and public to gain access to criminal trials will not be restricted except where necessary to protect the State's interest. Pp. 11–13.

(b) The second asserted interest is not only speculative in empirical terms but is also open to serious question as a matter of logic and common sense. Although the statute was construed to bar the press and public from the courtroom during a minor sex victim's testimony, the press is not denied access to the transcript, court personnel, or any other source that could provide an account of such testimony, and thus the statute cannot prevent the press from publicizing the substance of that testimony, as well as the victim's identity. Pp. 13–14.

—— Mass. ——, 423 N.E. 2d 773, reversed.

BRENNAN, J., delivered the opinion of the Court, in which WHITE, MARSHALL, BLACKMUN, and POWELL, JJ., joined. O'CONNOR, J., filed an opinion concurring in the judgment. BURGER, C. J., filed a dissenting opinion, in which REHNQUIST, J., joined. STEVENS, J., filed a dissenting opinion.

NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D.C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

SUPREME COURT OF THE UNITED STATES

No. 81-611

GLOBE NEWSPAPER COMPANY, APPELLANT *v.* SUPERIOR COURT FOR THE COUNTY OF NORFOLK

ON APPEAL FROM THE SUPREME JUDICIAL COURT OF MASSACHUSETTS

[June 23, 1982]

JUSTICE BRENNAN delivered the opinion of the Court.

Section 16A of Chapter 278 of Massachusetts General Laws,[1] as construed by the Massachusetts Supreme Judicial Court, requires trial judges, at trials for specified sexual offenses involving a victim under the age of 18, to exclude the press and general public from the courtroom during the testimony of that victim. The question presented is whether the statute thus construed violates the First Amendment as applied to the States through the Fourteenth Amendment.

I

The case began when appellant, Globe Newspaper Co. (Globe), unsuccessfully attempted to gain access to a rape trial conducted in the Superior Court for the County of Norfolk, Commonwealth of Massachusetts. The criminal defendant in that trial had been charged with the forcible rape and forced unnatural rape of three girls who were minors at the time of trial—two sixteen years of age and one seventeen. In April 1979, during hearings on several preliminary motions, the trial judge ordered the courtroom closed.[2] Before the trial began, Globe moved that the court revoke this closure order, hold hearings on any future such orders, and permit appellant to intervene "for the limited purpose of asserting its rights to access to the trial and hearings on related preliminary motions." App. 12a–14a. The trial court denied Globe's motions,[3] relying on Mass. Gen. Laws Ann., ch. 278, § 16A (West), and ordered the exclusion of the press and general public from the courtroom during the trial. The defendant immediately objected to that exclusion order, and the prosecution stated for purposes of the record that the order was issued on the court's "own motion and not at the request of the Commonwealth." App. 18a.

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[1] Mass. Gen. Laws, ch. 278, § 16A (West), which provides in pertinent part:

"At the trial of a complaint or indictment for rape, incest, carnal abuse or other crime involving sex, where a minor under eighteen years of age is the person upon, with or against whom the crime is alleged to have been committed, . . . the presiding justice shall exclude the general public from the court room, admitting only such persons as may have a direct interest in the case."

Within hours after the court had issued its exclusion order, Globe sought injunctive relief from a justice of the Supreme Judicial Court of Massachusetts.[4] The next day the justice conducted a hearing, at which the Commonwealth, "on behalf of the victims," waived "whatever rights it [might] have [had] to exclude the press." App. 28a.[5] Nevertheless,

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[2] "The court caused a sign marked 'closed' to be placed on the courtroom door, and court personnel turned away people seeking entry." *Globe Newspaper Co.* v. *Superior Court*, —— Mass. ——, ——, 401 N.E. 2d 360, 362–363 (1980) (footnote omitted).

[3] The court refused to permit Globe to file its motion to intervene and explicitly stated that it would not act on Globe's other motions. App. 17a–18a.

[4] Globe's request was contained in a petition for extraordinary relief filed pursuant to Mass. Gen. Laws Ann., ch. 211, § 3 (West).

[5] The Commonwealth's representative stated:

"[O]ur position before the trial judge [was], and it is before this Court, that in some circumstances a trial judge, where the defendant is asserting his right to a constitutional, public trial, . . . may consider that as outweighing the otherwise legitimate statutory interests, particularly where the Commonwealth [acts] on behalf of the victims, and this is literally on behalf of

Globe's request for relief was denied. Before Globe appealed to the full court, the rape trial proceeded and the defendant was acquitted.

Nine months after the conclusion of the criminal trial, the Supreme Judicial Court issued its judgment, dismissing Globe's appeal. Although the court held that the case was rendered moot by completion of the trial, it nevertheless stated that it would proceed to the merits, because the issues raised by Globe were "significant and troublesome, and . . . 'capable of repetition yet evading review.'" —— Mass. ——, ——, 401 N.E. 2d 360, 362, quoting *Southern Pacific Terminal Co.* v. *ICC*, 219 U. S. 498, 515 (1911). As a statutory matter, the court agreed with Globe that § 16A did not require the exclusion of the press from the entire criminal trial. The provision was designed, the court determined, "to encourage young victims of sexual offenses to come forward; once they have come forward, the statute is designed to preserve their ability to testify by protecting them from undue psychological harm at trial." —— Mass., at ——, 401 N.E. 2d, at 369. Relying on these twin purposes, the court con-

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the victims in the sense that they were consulted fully by the prosecutor in this case. The Commonwealth waives whatever rights it may have to exclude the press." App. 28a.

Some time after the trial began, the prosecuting attorney informed the judge at a lobby conference that she had "spoke[n] with each of the victims regarding . . . excluding the press." App. 48a. The prosecuting attorney indicated that the victims had expressed some "privacy concerns" that were based on "their own privacy interests, as well as the fact that there are grandparents involved with a couple of these victims." *Ibid.* But according to the prosecuting attorney, the victims "wouldn't object to the press being included" if "it were at all possible to obtain a guarantee" that the press would not attempt to interview them or publish their names, photographs, or any personal information. *Ibid.* In fact, their names were already part of the public record. See *Globe Newspaper Co.* v. *Superior Court*, —— Mass. ——, ——, 423 N.E. 2d 773, 780 (1981). It is not clear from the record, however, whether or not the victims were aware of this fact at the time of their discussions with the prosecuting attorney.

cluded that § 16A *required* the closure of sex-offense trials only during the testimony of minor victims; during other portions of such trials, closure was "a matter within the judge's sound discretion." *Id.*, at ——, 401 N.E. 2d, at 371. The court did not pass on Globe's contentions that it had a right to attend the entire criminal trial under the First and Sixth Amendments, noting that it would await this Court's decision—then pending—in *Richmond Newspapers, Inc.* v. *Virginia*, 448 U. S. 555 (1980).[6]

Globe then appealed to this Court. Following our decision in *Richmond Newspapers*, we vacated the judgment of the Supreme Judicial Court, and remanded the case for further consideration in light of that decision. 449 U. S. 894 (1980).

On remand, the Supreme Judicial Court, adhering to its earlier construction of § 16A, considered whether our decision in *Richmond Newspapers* required the invalidation of the mandatory-closure rule of § 16A. —— Mass. ——, 423 N.E. 2d 773 (1981).[7] In analyzing the First Amendment issue,[8] the court recognized that there is "an unbroken tradition of openness" in criminal trials. *Id.*, at 778. But the court discerned "at least one notable exception" to this tradi-

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[6] Justice Quirico dissented, being of the view that the mandatory-closure rule of § 16A was not limited to the testimony of minor victims, but was applicable to the entire trial.

[7] The court again noted that the First Amendment issue arising from the closure of the then-completed trial was "capable of repetition yet evading review." —— Mass., at ——, n. 4, 423 N.E. 2d, at 775, n. 4, quoting *Southern Pacific Terminal Co.* v. *ICC*, 219 U. S. 498, 515 (1911). But in contrast to the view it had taken in its prior opinion, *supra*, at 3, the court held that the case was *not moot* because of this possibility of repetition without opportunity for review.

[8] The court found it unnecessary to consider Globe's argument that the mandatory-closure rule violated the Sixth Amendment rights of the criminal defendant who had been acquitted in the rape trial. Those Sixth Amendment rights, the court stated, were "personal rights" that, "at least in the context of this case, [could] only be asserted by the original criminal defendant." —— Mass., at ——, 423 N.E. 2d, at 776 (footnote omitted).

tion: "In cases involving sexual assaults, portions of trials have been closed to some segments of the public, even when the victim was an adult." *Ibid.* The court also emphasized that § 16A's mandatory-closure rule furthered "genuine State interests," which the court had identified in its earlier decision as underlying the statutory provision. These interests, the court stated, "would be defeated if a case-by-case determination were used." *Id.*, at 779. While acknowleging that the mandatory-closure requirement results in a "temporary diminution" of the "the public's knowledge about these trials," the court did not think "that *Richmond Newspapers* require[d] the invalidation of the requirement, given the statute's narrow scope in an area of traditional sensitivity to the needs of victims." *Id.*, at 781. The court accordingly dismissed Globe's appeal.[9]

Globe again sought review in this Court. We noted probable jurisdiction. —— U. S. —— (1981). For the reasons that follow, we reverse, and hold that the mandatory-closure rule contained in § 16A violates the First Amendment.[10]

II

In this Court, Globe challenges that portion of the trial court's order, approved by the Supreme Judicial Court of Massachusetts, that holds that § 16A requires, under all circumstances, the exclusion of the press and general public during the testimony of a minor victim in a sex-offense trial. Because the entire order expired with the completion of the rape trial at which the defendant was acquitted, we must consider at the outset whether a live controversy remains.

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[9] Justice Wilkins filed a concurring opinion in which he expressed concern whether a statute constitutionally could require closure "without specific findings by the judge that the closing is justified by overriding or countervailing interests of the Commonwealth." —— Mass., at ——, 423 N.E. 2d, at 782.

[10] We therefore have no occasion to consider Globe's additional argument that the provision violates the Sixth Amendment.

Under Art. III, §2, of the Constitution, our jurisdiction extends only to actual cases or controversies. *Nebraska Press Assn.* v. *Stuart*, 427 U. S. 539, 546 (1976). "The Court has recognized, however, that jurisdiction is not necessarily defeated simply because the order attacked has expired, if the underlying dispute between the parties is one 'capable of repetition, yet evading review.'" *Ibid.*, quoting *Southern Pacific Terminal Co.* v. *ICC*, 219 U. S. 498, 515 (1911).

The controversy between the parties in this case is indeed "capable of repetition, yet evading review." It can reasonably be assumed that Globe, as the publisher of a newspaper serving the Boston metropolitan area, will someday be subjected to another order relying on §16A's mandatory-closure rule. See *Gannett Co.* v. *DePasquale*, 443 U. S. 368, 377–378 (1979); *Richmond Newspapers, Inc.* v. *Virginia*, 448 U. S. 555, 563 (1980) (plurality opinion). And because criminal trials are typically of "short duration," *ibid.*, such an order will likely "evade review, or at least considered plenary review in this Court." *Nebraska Press Assn.* v. *Stuart*, *supra*, at 547. We therefore conclude that the controversy before us is not moot within the meaning of Art. III, and turn to the merits.

III

A

The Court's recent decision in *Richmond Newspapers* firmly established for the first time that the press and general public have a constitutional right of access to criminal trials. Although there was no opinion of the Court in that case, seven Justices recognized that this right of access is embodied in the First Amendment, and applied to the States through the Fourteenth Amendment. *Id.*, at 558–581 (plurality opinion); *id.*, at 584–598 (BRENNAN, J., concurring in the judgment); *id.*, at 598–601 (Stewart, J., concurring in the judgment); *id.*, at 601–604 (BLACKMUN, J., concurring in the judgment).[11]

Of course, this right of access to criminal trials is not explicitly mentioned in terms in the First Amendment.[12] But we have long eschewed any "narrow, literal conception" of the Amendment's terms, *NAACP* v. *Button*, 371 U. S. 415, 430 (1963), for the Framers were concerned with broad principles, and wrote against a background of shared values and practices. The First Amendment is thus broad enough to encompass those rights that, while not unambiguously enumerated in the very terms of the Amendment, are nonetheless necessary to the enjoyment of other First Amendment rights. *Richmond Newspapers, Inc.* v. *Virginia*, 448 U. S., at 579–580, and n. 16 (plurality opinion) (citing cases); *id.*, at 587–588, and n. 4 (BRENNAN, J., concurring in the judgment). Underlying the First Amendment right of access to criminal trials is the common understanding that "a major purpose of that Amendment was to protect the free discussion of governmental affairs," *Mills* v. *Alabama*, 384 U. S. 214, 218 (1966). By offering such protection, the First Amendment serves to ensure that the individual citizen can effectively participate in and contribute to our republican system of self-government. See *Thornhill* v. *Alabama*, 310 U. S. 88, 95 (1980); *Richmond Newspapers, Inc.* v. *Virginia*, 448 U. S., at 587–588 (BRENNAN, J., concurring in the judgment). See also *id.*, at 575 (plurality opinion) (the "expressly guaranteed freedoms" of the First Amendment

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[11] JUSTICE POWELL took no part in the consideration or decision of *Richmond Newspapers*. But he had indicated previously in a concurring opinion in *Gannett Co.* v. *DePasquale*, 443 U. S. 368 (1979), that he viewed the First Amendment as conferring on the press a right of access to criminal trials. *Id.*, at 397–398.

[12] "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." U. S. Const., Amdt. 1.

"share a common core purpose of assuring freedom of communication on matters relating to the functioning of government"). Thus to the extent that the First Amendment embraces a right of access to criminal trials, it is to ensure that this constitutionally protected "discussion of governmental affairs" is an informed one.

Two features of the criminal justice system, emphasized in the various opinions in *Richmond Newspapers*, together serve to explain why a right of access to *criminal trials* in particular is properly afforded protection by the First Amendment. First, the criminal trial historically has been open to the press and general public. "[A]t the time when our organic laws were adopted, criminal trials both here and in England had long been presumptively open." *Richmond Newspapers, Inc.* v. *Virginia*, *supra*, at 569 (plurality opinion). And since that time, the presumption of openness has remained secure. Indeed, at the time of this Court's decision in *In re Oliver*, 333 U. S. 257 (1948), the presumption was so solidly grounded that the Court was "unable to find a single instance of a criminal trial conducted in camera in any federal, state, or municipal court during the history of this country." *Id.*, at 266 (footnote omitted). This uniform rule of openness has been viewed as significant in constitutional terms not only "because the Constitution carries the gloss of history," but also because "a tradition of accessibility implies the favorable judgment of experience." *Richmond Newspapers, Inc.* v. *Virginia*, *supra*, at 589 (BRENNAN, J., concurring in the judgment).[13]

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[13] Appellee argues that criminal trials have not always been open to the press and general public during the testimony of minor sex victims. Brief for Appellee 13–22. Even if appellee is correct in this regard, but see *Gannett Co.* v. *DePasquale*, 443 U. S. 368, 423 (1979) (BLACKMUN, J., concurring in part and dissenting in part), the argument is unavailing. In *Richmond Newspapers*, the Court discerned a First Amendment right of access to *criminal trials* based in part on the recognition that as a general matter criminal trials have long been presumptively open. Whether the

Second, the right of access to criminal trials plays a particularly significant role in the functioning of the judicial process and the government as a whole. Public scrutiny of a criminal trial enhances the quality and safeguards the integrity of the factfinding process, with benefits to both the defendant and to society as a whole.[14] Moreover, public access to the criminal trial fosters an appearance of fairness, thereby heightening public respect for the judicial process.[15] And in the broadest terms, public access to criminal trials permits the public to participate in and serve as a check upon the judicial process—an essential component in our structure of self-government.[16] In sum, the institutional value of the open criminal trial is recognized in both logic and experience.

B

Although the right of access to criminal trials is of constitutional stature, it is not absolute. See *Richmond Newspapers, Inc.* v. *Virginia*, *supra*, at 581, n. 18 (plurality opinion); *Nebraska Press Assn.* v. *Stuart*, 427 U. S., at 570. But the

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First Amendment right of access to criminal trials can be restricted in the context of any particular criminal trial, such as a murder trial (the setting for the dispute in *Richmond Newspapers*) or a rape trial, depends not on the historical openness of that type of criminal trial but rather on the state interests assertedly supporting the restriction. See Part III-B *infra*.

[14] See *Richmond Newspapers, Inc.* v. *Virginia*, 448 U. S., at 569 (plurality opinion); *id.*, at 596–597 (BRENNAN, J., concurring in the judgment); *Gannett Co.* v. *DePasquale*, 443 U. S. 368, 383 (1979); *id.*, at 428–429 (BLACKMUN, J., concurring in part and dissenting in part).

[15] See *Levine* v. *United States*, 362 U. S. 610, 616 (1960); *In re Oliver*, 333 U. S. 257, 268–271 (1948); *Richmond Newspapers, Inc.* v. *Virginia*, 448 U. S., at 570–571 (plurality opinion); *id.*, at 595 (BRENNAN, J., concurring in the judgment); *Gannett Co.* v. *DePasquale*, *supra*, at 428–429 (BLACKMUN, J., concurring in part and dissenting in part).

[16] See *Richmond Newspapers, Inc.* v. *Virginia*, 448 U. S., at 570–571 (plurality opinion); *id.*, at 596 (BRENNAN, J., concurring in the judgment); *Gannett Co.* v. *DePasquale*, 443 U. S., at 394 (BURGER, C. J., concurring); *id.*, at 428 (BLACKMUN, J., concurring in part and dissenting in part).

circumstances under which the press and public can be barred from a criminal trial are limited; the State's justification in denying access must be a weighty one. Where, as in the present case, the State attempts to deny the right of access in order to inhibit the disclosure of sensitive information, it must be shown that the denial is necessitated by a compelling governmental interest, and is narrowly tailored to serve that interest. See, *e. g.*, *Brown* v. *Hartlage*, —— U. S. ——, —— (1982); *Smith* v. *Daily Mail Publishing Co.*, 443 U. S. 97, 101–103 (1979); *NAACP* v. *Button*, 371 U. S. 415, 438 (1963).[17] We now consider the state interests advanced to support Massachusetts' mandatory rule barring press and public access to criminal sex-offense trials during the testimony of minor victims.

IV

The state interests asserted to support § 16A, though articulated in various ways, are reducible to two: the protection of minor victims of sex crimes from further trauma and embarassment; and the encouragement of such victims to come forward and testify in a truthful and credible manner.[18] We consider these interests in turn.

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[17] Of course, limitations on the right of access that resemble "time, place, and manner" restrictions on protected speech, see *Young* v. *American Mini Theatres*, 427 U. S. 50, 63, n. 18 (1976), would not be subjected to such strict scrutiny. See *Richmond Newspapers, Inc.* v. *Virginia*, 448 U. S., at 581–582, n, 18 (plurality opinion); *id.*, at 598, n. 23 (BRENNAN, J., concurring in the judgment); *id.*, at 600 (Stewart, J., concurring in the judgment).

[18] In its opinion following our remand, the Supreme Judicial Court of Massachusetts described the interests in the following terms:

"(a) to encourage minor victims to come forward to institute complaints and give testimony . . . ; (b) to protect minor victims of certain sex crimes from public degradation, humiliation, demoralization, and psychological damage . . . ; (c) to enhance the likelihood of credible testimony from such minors, free of confusion, fright, or embellishment; (d) to promote the sound and orderly administration of justice . . . ; (e) to preserve evidence and obtain

We agree with respondent that the first interest—safeguarding the physical and psychological well-being of a minor[19]—is a compelling one. But as compelling as that interest is, it does not justify a *mandatory*-closure rule, for it is clear that the circumstances of the particular case may affect the significance of the interest. A trial court can determine on a case-by-case basis whether closure is necessary to protect the welfare of a minor victim.[20] Among the factors to be weighed are the minor victim's age, psychological maturity, and understanding, the nature of the crime, the desires of the victim,[21] and the interests of parents and relatives. Section 16A, in contrast, requires closure even if the victim does not seek the exclusion of the press and general public, and would not suffer injury by their presence.[22] In the case before us,

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just convictions." —— Mass., at ——, 423 N.E. 2d, at 779.

[19] It is important to note that in the context of § 16A, the measure of the State's interest lies not in the extent to which minor victims are injured by testifying, but rather in the incremental injury suffered by testifying *in the presence of the press and the general public.*

[20] Indeed, the plurality opinion in *Richmond Newspapers* suggested that individualized determinations are *always* required before the right of access may be denied: "Absent an overriding interest *articulated in findings*, the trial of a criminal case must be open to the public." 448 U. S., at 581 (footnote omitted) (emphasis added).

[21] "[I]f the minor victim wanted the public to know precisely what a heinous crime the defendant had committed, the imputed legislative justifications for requiring the closing of the trial during the victim's testimony would in part, at least, be inapplicable." *Globe Newspaper Co.* v. *Superior Court*, —— Mass. ——, ——, 423 N.E. 2d 773, 782 (Wilkins, J., concurring).

[22] It appears that while other States have statutory or constitutional provisions that would *allow* a trial judge to close a criminal sex-offense trial during the testimony of a minor victim, no other State has a *mandatory* provision excluding both the press and general public during such testimony. See, *e. g.*, Ala. Code § 12-21-202 (1975); Ariz. R. Crim. P. 9.3 (1973); Ga. Code § 81-1006 (1956 Rev.); La. Rev. Stat. Ann. § 15:469.1 (West 1981); Miss. Const., Art. 3, § 26; N.H. Rev. Stat. Ann. § 632-A:8 (Supp. 1979); N.Y. Jud. Law § 4 (McKinney 1968); N.C. Gen. Stat.

for example, the names of the minor victims were already in the public record,[23] and the record indicates that the victims may have been willing to testify despite the presence of the press.[24] If the trial court had been permitted to exercise its discretion, closure might well have been deemed unnecessary. In short, § 16A cannot be viewed as a narrowly tailored means of accommodating the State's asserted interest: That interest could be served just as well by requiring the trial court to determine on a case-by-case basis whether the State's legitimate concern for the well-being of the minor victim necessitates closure. Such an approach ensures that the constitutional right of the press and public to gain access to criminal trials will not be restricted except where necessary to protect the State's interest.[25]

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§ 15-166 (Supp. 1981); N.D. Cent. Code § 27-01-02 (1974); Utah Code Ann. § 78-7-4 (1953); Vt. Stat. Ann., Tit. 12, § 1901 (1973); Wis. Stat. § 970.03(4) (Supp. 1981). See also Fla. Stat. § 918.16 (Supp. 1982) (providing for mandatory exclusion of *general public* but not *press* during testimony of minor victims). Of course, we intimate no view regarding the constitutionality of these state statutes.

[23] The Court has held that the government may not impose sanctions for the publication of the names of rape victims lawfully obtained from the public record. *Cox Broadcasting Corp.* v. *Cohn*, 420 U. S. 469 (1975). See also *Smith* v. *Daily Mail Publishing Co.*, 443 U. S. 97 (1979).

[24] See *supra*, at 2-3, and n. 5.

[25] Of course, for a case-by-case approach to be meaningful, representatives of the press and general public "must be given an opportunity to be heard on the question of their exclusion." *Gannett Co.* v. *DePasquale*, 443 U. S. 368, 401 (1979) (POWELL, J., concurring). This does not mean, however, that for purposes of this inquiry the court cannot protect the minor victim by denying these representatives the opportunity to confront or cross-examine the victim, or by denying them access to sensitive details concerning the victim and the victim's future testimony. Such discretion is consistent with the traditional authority of trial judges to conduct in camera conferences. See *Richmond Newspapers, Inc.* v. *Virginia*, 448 U. S., at 598, n. 23 (BRENNAN, J., concurring in the judgment). Without such trial court discretion, a State's interest in safeguarding the welfare of the minor victim, determined in an individual case to merit some form of clo-

Nor can § 16A be justified on the basis of the Commonwealth's second asserted interest—the encouragement of minor victims of sex crimes to come forward and provide accurate testimony. The Commonwealth has offered no empirical support for the claim that the rule of automatic closure contained in § 16A will lead to an increase in the number of minor sex victims coming forward and cooperating with state authorities.[26] Not only is the claim speculative in empirical terms, but it is also open to serious question as a matter of logic and common sense. Although § 16A bars the press and general public from the courtroom during the testimony of minor sex victims, the press is not denied access to the transcript, court personnel, or any other possible source that could provide an account of the minor victim's testimony. Thus § 16A cannot prevent the press from publicizing the substance of a minor victim's testimony, as well as his or her identity. If the Commonwealth's interest in encouraging minor victims to come forward depends on keeping such matters secret, § 16A hardly advances that interest in an effective manner. And even if § 16A effectively advanced the State's interest, it is doubtful that the interest would be sufficient to overcome the constitutional attack, for that same interest could be relied on to support an array of mandatory-closure rules designed to encourage victims to come forward: Surely it cannot be suggested that minor victims of sex crimes are the *only* crime victims who, because of publicity

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sure, would be defeated before it could ever be brought to bear.

[26] To the extent that it is suggested that, quite apart from encouraging minor victims to testify, § 16A improves the quality and credibility of testimony, the suggestion also is speculative. And while closure may have such an effect in particular cases, the Court has recognized that, *as a general matter*, "*[o]penness* in court proceedings may *improve* the quality of testimony." *Gannett Co.* v. *DePasquale*, 443 U. S. 368, 383 (1979) (emphasis added). In the absence of any showing that closure would improve the quality of testimony of *all* minor sex victims, the State's interest certainly cannot justify a *mandatory*-closure rule.

attendant to criminal trials, are reluctant to come forward and testify. The State's argument based on this interest therefore proves too much, and runs contrary to the very foundation of the right of access recognized in *Richmond Newspapers*: namely, "that a presumption of openness inheres in the very nature of a criminal trial under our system of justice." 448 U. S., at 573 (plurality opinion).

V

For the foregoing reasons, we hold that § 16A, as construed by the Massachusetts Supreme Judicial Court, violates the First Amendment to the Constitution.[27] Accordingly, the judgment of the Massachusetts Supreme Judicial Court is

Reversed.

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[27] We emphasize that our holding is a narrow one: that a rule of mandatory closure respecting the testimony of minor sex victims is constitutionally infirm. In individual cases, and under appropriate circumstances, the First Amendment does not necessarily stand as a bar to the exclusion from the courtroom of the press and general public during the testimony of minor sex-offense victims. But a mandatory rule, requiring no particularized determinations in individual cases, is unconstitutional.

SUPREME COURT OF THE UNITED STATES

No. 81-611

GLOBE NEWSPAPER COMPANY, APPELLANT *v.* SUPERIOR COURT FOR THE COUNTY OF NORFOLK

ON APPEAL FROM THE SUPREME JUDICIAL COURT OF MASSACHUSETTS

[June 23, 1982]

JUSTICE O'CONNOR, concurring in the judgment.

In *Richmond Newspapers, Inc.* v. *Virginia*, 448 U. S. 555 (1980), the Court held that the First Amendment protects the right of press and public to attend criminal trials. I do not interpret that decision to shelter every right that is "necessary to the enjoyment of other First Amendment rights." *Ante*, at 7. Instead, *Richmond Newspapers* rests upon our long history of open criminal trials and the special value, for both public and accused, of that openness. As the plurality opinion in *Richmond Newspapers* stresses, "it would be difficult to single out any aspect of government of higher concern and importance to the people than the manner in which criminal trials are conducted." 448 U. S., at 575. Thus, I interpret neither *Richmond Newspapers* nor the Court's decision today to carry any implications outside the context of criminal trials.

This case, however, does involve a criminal trial. Moreover, it involves a statute mandating automatic exclusion of the public from certain testimony. As the Court explains, Massachusetts has demonstrated no interest weighty enough to justify application of its automatic bar to all cases, even those in which the victim, defendant, and prosecutor have no objection to an open trial. Accordingly, I concur in the judgment.

SUPREME COURT OF THE UNITED STATES

No. [illegible]

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[June 23, 1982]

CHIEF JUSTICE BURGER, with whom JUSTICE REHNQUIST joins, dissenting.

Historically our Society has gone to great lengths to protect minors *charged* with crime, particularly by prohibiting the release of the names of offenders, barring the press and public from juvenile proceedings, and sealing the records of those proceedings. Yet today the Court holds unconstitutional a state statute designed to protect not the *accused*, but the minor *victims* of sex crimes. In doing so, it advances a disturbing paradox. Although states are permitted, for example, to mandate the closure of all proceedings in order to protect a 17-year-old charged with rape, they are not permitted to require the closing of part of criminal proceedings in order to protect an innocent child who has been raped or otherwise sexually abused.

The Court has tried to make its holding a narrow one by not disturbing the authority of state legislatures to enact more narrowly drawn statutes giving trial judges the discretion to exclude the public and the press from the courtroom during the minor victim's testimony. *Ante*, at 14 n. 28. I also do not read the Court's opinion as foreclosing a state statute which mandates closure except in cases where the victim agrees to testify in open court.[1] But the Court's decision is nevertheless a gross invasion of state authority and a state's duty to protect its citizens—in this case minor victims of crime. I cannot agree with the Court's expansive interpretation of our decision in *Richmond Newspapers, Inc.* v. *Virginia*, 448 U. S. 555 (1980), or its cavalier rejection of the serious interests supporting Massachusetts' mandatory closure rule. Accordingly, I dissent.

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[1] It certainly cannot be said that the victims in this case consented to testifying in open court. During a lobby conference prior to trial, the

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The Court seems to read our decision in *Richmond Newspapers*, *supra*, as spelling out a First Amendment right of access to all aspects of all criminal trials under all circumstances. *Ante*, at n. 14. That is plainly incorrect. In *Richmond Newspapers*, we examined "the right of access to

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prosecutor informed the trial judge that she had interviewed the victims, that they were concerned about publicity, and would agree to press attendance only if certain guarantees could be given:

"Each of [the three victims] indicated that they had the same concerns and basically they are privacy concerns.

The difficulty of obtaining any kind of guarantee that the press would not print their names or where they go to school or any personal data or take pictures of them or attempt to interview them, those concerns come from their own privacy interests, as well as the fact that there are grandparents involved with a couple of these victims who do not know what happened and if they were to find out by reading the paper, everyone was concerned about what would happen then. And they stated that if it were at all possible to obtain a guarantee that this information would not be used, then they wouldn't object to the press being included. I explained that that is [a] very difficult guarantee to obtain because the Court cannot issue a conditional order, or anything like that, but I just wanted to put on the record what their concerns were and what they are afraid of." Joint Appendix at 48a.

It is clear that the victims would "waive" the exclusion of the press only if the trial court gave them guarantees of strict privacy, guarantees that were probably beyond the authority of the court and which themselves would raise grave constitutional problems. See *Oklahoma Publishing Co.* v. *District Court of Oklahoma County*, 430 U. S. 308 (1977); *Cox Broadcasting Corp.* v. *Cohn*, 420 U. S. 469 (1975).

places traditionally open to the public" and concluded that criminal trials were generally open to the public throughout this country's history and even before that in England. The opinions of a majority of the Justices emphasized the historical tradition of open criminal trials. *Id.*, at 564–573; *id.*, at 589–591 (JUSTICE BRENNAN, concurring in the judgment); *id.*, at 599 (Justice Stewart, concurring in the judgment); *id.*, at 601 (JUSTICE BLACKMUN, concurring in the judgment). The proper mode of analysis to be followed in determining whether there is a right of access was emphasized by JUSTICE BRENNAN:

> "As previously noted, resolution of First Amendment public access claims in individual cases must be strongly influenced by the weight of historical practice and by an assessment of the specific structural value of public access in the circumstances." *Id.*, at 597–598.

Today JUSTICE BRENNAN ignores the weight of historical practice. There is clearly a long history of exclusion of the public from trials involving sexual assaults, particularly those against minors. See, *e. g.*, *Harris* v. *Stephens*, 361 F. 2d 888 (CA8 1966), *cert. denied*, 386 U. S. 964 (1967); *Reagan* v. *United States*, 202 F. 488 (CA9 1913); *United States* v. *Geise*, 158 F. Supp. 821 (D. Alaska), *aff'd*, 262 F. 2d 151 (CA9 1958), *cert. denied*, 361 U. S. 842 (1959); *Hogan* v. *State*, 191 Ark. 437 (1935); *State* v. *Purvis*, 157 Conn. 198 (1968), *cert. denied*, 395 U. S. 928 (1969); *Moore* v. *State*, 151 Ga. 648 (1921), *appeal dismissed*, 260 U. S. 702 (1922).[2] Several states have longstanding provisions allowing closure of cases involving sexual assaults against minors.[3]

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[2] Cf. *Stamicarbon, N.V.* v. *American Cyanamid Co.*, 506 F. 2d 532, 539–540 (1974), and cases cited therein.

[3] See, *e. g.*, Alabama Const., Art. VI, § 169 (1901) (repealed, 1973); Fla. Stat. Ann. § 918.16; Ga. Code § 81–1006; Miss. Const., Art. 3, § 26; N.H. Rev. Stat. Ann. § 632–A:8; N.Y. Jud. Law § 4 (McKinney); N.C. Gen. Stat. § 15–166; Utah Code Ann. § 78–7–4.

It would misrepresent the historical record to state that there is an "unbroken, uncontradicted history" of open proceedings in cases involving the sexual abuse of minors. *Richmond Newspapers*, *supra*, at 573. Absent such a history of openness, the positions of the Justices joining reversal in *Richmond Newspapers* gives no support to the proposition that closure of the proceedings during the testimony of the minor victim violates the First Amendment.[4]

II

The Court does not assert that the First Amendment right it discerns from *Richmond Newspapers* is absolute; instead, it holds that when a "State attempts to deny the right of access in order to inhibit the disclosure of senstive information, it must be shown that the denial is necessitated by a compelling governmental interest, and is narrowly tailored to serve that interest." *Ante*, at 10. The Court's wooden application of the rigid standard it asserts for this case is inappropriate. The Commonwealth has not denied the public or the media access to information as to what takes place at trial. As the Court acknowledges, Massachusetts does not deny the press and the public access to the trial transcript or to other sources of information about the victim's testimony. Even the victim's identity is part of the public record, although the name of a 16-year-old accused rapist generally would not be a matter of public record. Mass. Gen. Laws Ann. ch. 119, § 60A (West). The Commonwealth does not deny access to information, and does nothing whatever to inhibit its disclosure. This case is quite unlike others in which we have held unconstitutional state laws which prevent the dissemination of information or the public discussion of ideas. See, *e. g.*, *Brown* v. *Hartlage*, —— U. S. —— (1981); *Smith* v. *Daily*

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[4] It is hard to find a limiting principle in the Court's analysis. The same reasoning might require a hearing before a trial judge could hold a bench conference or any *in camera* proceedings.

Mail Publishing Co., 443 U. S. 97 (1979); *Landmark Communications, Inc.* v. *Virginia*, 435 U. S. 829 (1978); *Nebraska Press Association* v. *Stuart*, 427 U. S. 539 (1976); *Cox Broadcasting Co.* v. *Cohen*, 420 U. S. 469 (1975); *NAACP* v. *Button*, 371 U. S. 415 (1963).

The purpose of the Commonwealth in enacting § 16A was to give assurance to parents and minors that they would have this moderate and limited protection from the trauma, embarassment and humiliation of having to reveal the intimate details of a sexual assault in front of a large group of unfamiliar spectators—and perhaps a television audience—and to lower the barriers to the reporting of such crimes which might come from the victim's dread of public testimony. *Globe Newspaper Co.* v. *Superior Court*, —— Mass. ——, ——, 401 N.E. 2d 360, 372 (1980) (*Globe I*); *Globe Newspaper Co.* v. *Superior Court*, —— Mass. ——, ——, 423 N.E. 2d 773, 779 (1981 (*Globe II*).

Neither the purpose of the law nor its effect is primarily to deny the press or public access to information; the verbatim transcript is made available to the public and the media and may be used without limit. We therefore need only examine whether the restrictions imposed are reasonable and whether the interests of the Commonweatlth override the very limited incidental effects of the law on First Amendment rights. See *Richmond Newspapers*, *supra*, 448 U. S., at 580-581 (1980) (plurality opinion); *Id.*, at 600 (Stewart, J., concurring in the judgment); *Pell* v. *Procunier*, 417 U. S. 817 (1974); *Saxbe* v. *Washington Post Co.*, 417 U. S. 843 (1974); *Cox* v. *New Hampshire*, 312 U. S. 569 (1941). Our obligation in this case is to balance the competing interests: the interests of the media for instant access, against the interest of the state in protecting child rape victims from the trauma of public testimony. In more than half the states, public testimony will include television coverage.

III

For me, it seems beyond doubt, considering the minimal impact of the law on First Amendment rights and the overriding weight of the Commonwealth's interest in protecting child rape victims, that the Massachusetts law is not unconstitutional. The Court acknowledges that the press and the public have prompt and full access to all of the victim's testimony. Their additional interest in actually being present during the testimony is minimal. While denying it the power to protect children, the Court admits that the Commonwealth's interest in protecting the victimized child is a compelling interest. *Ante*, at 11. This meets the test of *Richmond Newspapers, supra.*

The law need not be precisely tailored so long as the state's interest overrides the law's impact on First Amendment rights and the restrictions imposed further that interest. Certainly this law, which excludes the press and public only during the actual testimony of the child victim of a sex crime, rationally serves the Commonwealth's overriding interest in protecting the child from the severe—possibly permanent—psychological damage. It is not disputed that such injury is a reality.[5]

The law also seems a rational response to the undisputed problem of the underreporting of rapes and other sexual offenses. The Court rejects the Commonwealth's argument that § 16A is justified by its interest in encouraging minors to report sex crimes, finding the claim "speculative in empirical terms [and] open to serious question as a matter of logic and common sense." *Ante*, at 13. There is no basis whatever for this cavalier disregard of the reality of human experience. It makes no sense to criticize the Commonwealth for its failure to offer empirical data in support of its rule; only by allowing state experimentation may such empirical evidence be produced. "It is one of the happy incidents of the federal system that a State may, if its citizens choose, serve as a laboratory, and try novel social and economic experiments without risk to the rest of the country." *New State Ice Co.* v. *Liebmann*, 285 U. S. 262, 311 (1932) (Brandeis, J., dissenting). See also *Chandler* v. *Florida*, 449 U. S. 560, 579–580 (1981); *Reeves, Inc.* v. *Stake*, 447 U. S. 429, 441 (1980); *Whalen* v. *Roe*, 429 U. S. 589, 597 and n. 20 (1977).

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[5] For a discussion of the traumatic effect of court proceedings on minor rape victims, see E. Hilberman, The Rape Victim 53–54; S. Katz & M. Mazur, Understanding the Rape Victim: A Synthesis of Research Findings 198–200 (1979), and studies cited therein.

The Court also concludes that the Commonwealth's assertion that the law might reduce underreporting of sexual offenses fails "as a matter of logic and common sense." This conclusion is based on a misperception of the Commonwealth's argument and an overly narrow view of the protection the statute seeks to afford young victims. The Court apparently believes that the statute does not prevent any significant trauma, embarassment or humiliation on the part of the victim simply because the press is not prevented from discovering and publicizing both the identity of the victim and the substance of the victim's testimony. *Ante*, at 14. Section 16A is intended not to preserve confidentiality, but to prevent the risk of severe psychological damage caused by having to relate the details of the crime in front of a crowd which inevitably will include voyeuristic strangers.[6] In most states, that crowd may be expanded to include a live television audience, with reruns on the evening news. That ordeal could be difficult for an adult; to a child, the experience can be devastating and leave permanent scars.[7]

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[6] As one commentator put it, "Especially in cases involving minors, the courts stress the serious embarassment and shame of the victim who is forced to testify to sexual acts or whose intimate life is revealed in detail before a crowd of the idly curious." Berger, Man's Trial, Woman's Tribulation: Rape Cases in the Courtroom, 77 Colum. L. Rev. 1, 88, (1977). The victim's interest in avoiding the humiliation of testifying in open court is thus quite separate from any interest in preventing the public from learning of the crime. It is ironic that the Court emphasizes the failure of the Commonwealth to seal the trial transcript and bar disclosure of the victim's identity. The Court implies that a state law more severely encroaching upon the interests of the press and public would be upheld.

The Commonwealth's interests are clearly furthered by the mandatory nature of the closure statute. Certainly if the law were discretionary, most judges would exercise that discretion soundly and would avoid unnecessary harm to the child, but victims and their families are entitled to assurance of such protection. The legislature did not act irrationally in deciding not to leave the closure determination to the idiosyncracies of individual judges subject to the pressures available to the media. The victim might very well experience considerable distress prior to the court appearance, wondering, in the absence of such statutory protection, whether public testimony will be required. The mere possibility of public testimony may cause parents and children to decide not to report these heinous crimes. If, as psychologists report, the courtroom experience in such cases is almost as traumatic as the crime itself,[8] a state certainly should be able to take whatever reasonable steps it believes are necessary to reduce that trauma. Furthermore, we cannot expect victims and their parents to be aware of all of the nuances of state law; a person who sees newspaper, or perhaps even television, reports of a minor victim's testimony may very well be deterred from reporting a crime on the belief that public testimony will be required. It is within the power of the state to provide for mandatory closure to alleviate such understandable fears and encourage the reporting of such crimes.

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[7] See E. Hilberman, *supra*; L. Holmstrom & A. Burgess, The Victim of Rape: Institutional Reactions 222, 227 (1978); Berger, *supra*, at 88, 92–93; Libai, The Protection of a Child Victim of a Sexual Offense in the Criminal Justice System, 15 Wayne L. Rev. 977, 1021 (1969). Holmstrom and Burgess report that nearly half of all *adult* rape victims were disturbed by the public setting of their trials. Certainly the impact on children must be greater.

[8] See Bohmer & Blumberg, Twice Traumatized: The Rape Victim and the Court, 58 Judicature 390 (1975); S. Katz & M. Mazur, *supra*; L. Holmstrom & A. Burgess, *supra*; E. Hilberman, *supra*; Berger, *supra*.

IV

There is, of course, "a presumption of openness [that] inheres in the very nature of a criminal trial under our system of justice." But we have consistently emphasized that this presumption is not absolute or irrebutable. A majority of the Justices in *Richmond Newspapers* acknowledged that closure might be permitted under certain circumstances. Justice Stewart's separate opinion pointedly recognized that exclusion of the public might be justified to protect "the sensibilities of a youthful prosecution witness . . . in a criminal trial for rape." 448 U. S., at 600 n. 5.[9] The Massachusetts statute has a relatively minor incidental impact on First Amendment rights and gives effect to the overriding state interest in protecting child rape victims. Paradoxically, the Court today denies the victims the kind of protection routinely given to juveniles who commit crimes. Many will find it difficult to reconcile the concern so often expressed for the rights of the accused with the callous indifference exhibited today for children who, having suffered the trauma of rape or other sexual abuse, are denied the modest protection the Massachusetts legislature provided.

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[9] See also 448 U. S., at 580–581; 448 U. S., at 582 (JUSTICE WHITE, concurring); 448 U. S., at 584 (JUSTICE STEVENS, concurring); 448 U. S., at 598 (JUSTICE BRENNAN, concurring in the judgment).

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SUPREME COURT OF THE UNITED STATES

No. 81-611

GLOBE NEWSPAPER COMPANY, APPELLANT *v.* SUPERIOR COURT FOR THE COUNTY OF NORFOLK

ON APPEAL FROM THE SUPREME JUDICIAL COURT OF MASSACHUSETTS

[June 23, 1982]

JUSTICE STEVENS, dissenting.

The duration of a criminal trial generally is shorter than the time it takes for this Court's jurisdiction to be invoked and our judgment on the merits to be announced. As a result, our power to review pretrial or midtrial orders implicating the freedom of the press has rested on the exception to the mootness doctrine for orders "capable of repetition, yet evading review." See *Richmond Newspapers, Inc.* v. *Virginia*, 448 U. S. 555, 563; *Gannett Co.* v. *DePasquale*, 443 U. S. 368, 377–378; *Nebraska Press Assn.* v. *Stuart*, 427 U. S. 539, 546–547.

Today the Court expands that exception in order to pass on the constitutionality of a statute that, as presently construed, has never been applied in a live controversy. In this case, unlike the three cases cited above, the governing state law was materially changed after the trial court's order had expired by its own terms. There consequently is no possibility "'that the same complaining party will be subject to the same action again.'" *Gannett Co.* v. *DePasquale*, *supra*, at 377 (quoting *Weinstein* v. *Bradford*, 423 U. S. 147, 149).

The fact that the Massachusetts Supreme Judicial Court narrowly construed—and then upheld in the abstract—the state statute that the trial court had read to mandate the closure of the entire trial bears on our review function in other respects. We have only recently recognized the First Amendment right of access to newsworthy matter. See *ante*, at 6; *Richmond Newspapers, Inc.* v. *Virginia*, *supra*, at 582 (STEVENS, J., concurring). In developing constitutional jurisprudence, there is a special importance in deciding cases on concrete facts. Cf. *Minnick* v. *California Dept. of Corrections*, 452 U. S. 105, 120–127; *United States* v. *Raines*, 362 U. S. 17, 21. Only in specific controversies can the Court decide how this right of access to criminal trials can be accommodated with other societal interests, such as the protection of victims or defendants. The advisory opinion the Court announces today sheds virtually no light on how such rights should be accommodated.

The question whether the Court should entertain a facial attack on a statute that bears on the right of access cannot be answered simply by noting that the right has its source in the First Amendment. See, *e. g.*, *Bates* v. *State Bar of Arizona*, 433 U. S. 350, 380–381; *Young* v. *American Mini Theatres, Inc.*, 427 U. S. 50, 61. For the right of access is plainly not coextensive with the right of expression that was vindicated in *Nebraska Press Assn.*, *supra*.[1] Because statutes that bear on this right of access do not deter protected activity in the way that other laws sometimes interfere with the right of expression, we should follow the norm of reviewing these statutes as applied rather than on their face.

It is not clear when, if ever, the Court will need to confront the question whether a mandatory partial-closure statute is unconstitutional. If the order hypothesized by the Supreme Judicial Court, instead of the trial court's order, had actually been entered in this case, and if the press had been given prompt access to a transcript of the testimony of the minor victims, appellant might not even have appealed. At the very least the press, the prosecutor, and defense counsel would have argued the constitutionality of the partial-closure order in the context of the facts relevant to such an order, and a different controversy would have been framed for appellate review. In future cases the trial courts may voluntarily follow the direction of Justice Wilkins and make specific findings demonstrating a compelling state interest supporting the mandated partial-closure order. See —— Mass. ——, ——, 423 N.E. 2d 773, 782 (concurring opinion). Or the record in future cases may plainly disclose a justification for a partial closure that the Court would consider acceptable. Thus, aside from the illumination provided by live controversies, a decision to review only orders actually entered pursuant to the Massachusetts statute would advance the policy of avoiding the premature and unnecessary adjudication of constitutional questions;[2] it is at least conceivable that no such order may ever have to be justified by the conclusion of the legislature that the mandatory closure of the trial during the testimony of a minor victim of a sex crime is necessary to serve important state interests.

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[1] For example, even though a reporter may have no right of access to a judge's side-bar conference, it surely does not follow that the judge could enjoin publication of what a reporter might have learned about such a conference.

The Court does not hold that on this record a closure order limited to the testimony of the minor victims would have been unconstitutional. Rather, the Court holds only that if ever such an order is entered, it must be supported by adequate findings. Normally, if the constitutional deficiency is the absence of findings to support a trial order, the Court would either remand for factfinding, or examine the record itself, before deciding whether the order measured up to constitutional standards. The infeasibility of this course of action—since no such order was entered in this case and since the order that was entered has expired—further demonstrates that the Court's comment on the First Amendment issues implicated by the Massachusetts statute is advisory, hypothetical, and, at best, premature.[3]

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[2] "But the most fundamental principle of constitutional adjudication is not to face constitutional questions but to avoid them, if at all possible." *United States* v. *Lovett*, 328 U. S. 303, 320 (Frankfurter, J., concurring).

I would dismiss the appeal.

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[3] The "capable of repetition, yet evading review" exception to the mootness doctrine generally is compatible with our settled policy of avoiding the premature adjudication of constitutional questions, see *Franks* v. *Bowman Transportation Co.*, 424 U. S. 747, 756, n. 8, for an order that is capable of repetition yet evading review generally is no less ripe for review the first time it is presented than it would be on subsequent occasions. But when the "order" that is presented for review the first time is formulated in the abstract, as was the ruling of the Supreme Judicial Court in this case, the policy requires the Court to defer review of such an order until it is entered in a live controversy.

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All issues available have been filmed.
Unfortunately, any scattered missing issues are no longer available.

81/81-613

(Slip Opinion)

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Lumber Co.*, 200 U. S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

SPORHASE ET AL. *v.* NEBRASKA EX REL. DOUGLAS, ATTORNEY GENERAL

APPEAL FROM SUPREME COURT OF NEBRASKA

No. 81-613. Argued March 30, 1982—Decided July 2, 1982

A Nebraska statute requires any person intending to withdraw ground water from any well located in the State and transport it for use in an adjoining State, to obtain a permit from the Nebraska Department of Water Resources. If the Director of Water Resources finds that such withdrawal is reasonable, not contrary to the conservation and use of ground water, and not otherwise detrimental to the public welfare, he will grant the permit if the State in which the water is to be used grants reciprocal rights to withdraw and transport ground water from that State for use in Nebraska. Appellants own contiguous tracts of land in Nebraska and Colorado, on which a well on the Nebraska tract pumps ground water for irrigation of both the Nebraska and Colorado tracts, but they never applied for the permit required by the statute. Appellee brought an action in a Nebraska state court to enjoin appellants from transferring the water across the border without a permit. Rejecting the defense that the statute imposed an undue burden on interstate commerce, the trial court granted the injunction. The Nebraska Supreme Court affirmed.

Held:

1. Ground water is an article of commerce and therefore subject to congressional regulation. Pp. 3–11.

(a) Although appellee's claimed greater ownership interest in ground water than in certain other natural resources may not be irrelevant to Commerce Clause analysis, it does not remove Nebraska ground water from such scrutiny, since appellee's argument is still based on the legal fiction of state ownership. Pp. 3–10.

(b) The States' interests in conserving and preserving scarce water resources in the arid Western States clearly have an interstate dimension. The agricultural markets supplied by irrigated farms provide the

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archtypical example of commerce among the States for which the Framers of the Constitution intended to authorize federal regulation. Here, the multistate character of the aquifer underlying appellants' tracts of land, as well as parts of Texas, New Mexico, Oklahoma, and Kansas, demonstrates that there is a significant federal interest in conservation as well as in fair allocation of diminishing water resources. Pp. 10–11.

2. The reciprocity requirement of the Nebraska statute violates the Commerce Clause as imposing an impermissible burden on interstate commerce. While the first three conditions set forth in the statute for granting a permit—that the withdrawal of the ground water be reasonable, not contrary to the conservation and use of ground water, and not otherwise detrimental to the public welfare—do not on their faces impermissibly burden interstate commerce, the reciprocity provision operates as an explicit barrier to commerce between Nebraska and its adjoining States. Nebraska therefore has the initial burden of demonstrating a close fit between the reciprocity requirement and its asserted local purpose. Such requirement, when superimposed on the first three restrictions, fails to clear this initial hurdle, since there is no evidence that it is narrowly tailored to the conservation and preservation rationale. Thus, it does not survive the "strictest scrutiny" reserved for facially discriminatory legislation. Pp. 12–16.

3. Congress has not granted the States permission to engage in ground water regulation that would otherwise be impermissible. Although there are 37 federal statutes and a number of interstate compacts demonstrating Congress' deference to state water law, they do not indicate that Congress wished to remove federal constitutional restraints on such state law. Neither the fact that Congress has chosen not to create a federal water law to govern water rights involved in federal water projects nor the fact that Congress has been willing to let the States settle their differences over water rights through mutual agreement, constitutes persuasive evidence that Congress consented to the unilateral imposition of unreasonable burdens on commerce. Pp. 16–18.

208 Neb. 703, 305 N. W. 2d 614, reversed and remanded.

STEVENS, J., delivered the opinion of the Court, in which BURGER, C. J., and BRENNAN, WHITE, MARSHALL, BLACKMUN, and POWELL, JJ., joined. REHNQUIST, J., filed a dissenting opinion, in which O'CONNOR, J., joined.

NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D.C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

SUPREME COURT OF THE UNITED STATES

No. 81-613

JOY SPORHASE AND DELMER MOSS, ETC., APPELLANTS *v.* NEBRASKA, EX REL. PAUL L. DOUGLAS, ATTORNEY GENERAL

APPEAL FROM THE SUPREME COURT OF NEBRASKA

[July 2, 1982]

JUSTICE STEVENS delivered the opinion of the Court.

Appellants challenge the constitutionality of a Nebraska statutory restriction on the withdrawal of ground water from any well within Nebraska intended for use in an adjoining State. The challenge presents three questions under the Commerce Clause:[1] (1) whether ground water is an article of commerce and therefore subject to Congressional regulation; (2) whether the Nebraska restriction on the interstate transfer of ground water imposes an impermissible burden on commerce; and (3) whether Congress has granted the States permission to engage in ground water regulation that otherwise would be impermissible.

Appellants jointly own contiguous tracts of land in Chase County, Nebraska, and Phillips County, Colorado. A well physically located on the Nebraska tract pumps ground water for irrigation of both the Nebraska tract and the Colorado tract. Previous owners of the land registered the well with the State of Nebraska in 1971, but neither they nor the present owners applied for the permit required by § 46-613.01 of the Nebraska Revised Statutes. That section provides:

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[1] Article I, § 8, cl. 3 of the United States Constitution provides: "The Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes. . . ." For general explanations of Commerce Clause analysis, see, *e. g., Western & Southern Life Insurance Co.* v. *State Board of Equalization*, 451 U. S. 648, 652-653 (1981); *Southern Pacific Co.* v. *Arizona*, 325 U. S. 761, 766-770 (1945).

> "Any person, firm, city, village, municipal corporation or any other entity intending to withdraw ground water from any well or pit located in the State of Nebraska and transport it for use in an adjoining state shall apply to the Department of Water Resources for a permit to do so. If the Director of Water Resources finds that the withdrawal of the ground water requested is reasonable, is not contrary to the conservation and use of ground water, and is not otherwise detrimental to the public welfare, he shall grant the permit if the state in which the water is to be used grants reciprocal rights to withdraw and transport ground water from that state for use in the State of Nebraska."

Appellee brought this action to enjoin appellants from transferring the water across the border without a permit.[2] The trial court rejected the defense that the statute imposed an undue burden on interstate commerce and granted the injunction. The Nebraska Supreme Court affirmed. 208 Neb. 703, 305 N.W. 2d 614 (1981). It held that, under Nebraska law, ground water is not "a marketable item freely transferable for value among private parties, and therefore [is] not an article of commerce." *Id.*, at 705, 305 N.W. 2d, at 616.[3] The Chief Justice, while agreeing that the statutory criteria governing the transfer of water to an adjoining State did not violate the Commerce Clause, dissented on the narrow ground that appellee violated both the Federal and Nebraska Constitutions by attempting "to absolutely prohibit the transfer of water, without regard to its need or availability, based solely upon the acts of another state over which citizens of this state have no control." *Id.*, at 713, 305 N.W. 2d, at 620.

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[2] Because of the reciprocity requirement of § 46-613.01, appellants would not have been granted a permit had they applied for one. Their failure to submit an application therefore does not deprive them of standing to challenge the legality of the reciprocity requirement. Cf. *Larson* v. *Valente*, — U. S. — (1982).

[3] The Nebraska Supreme Court also rejected appellants' equal protection and due process challenges. Appellants renew those challenges before this Court, but we need not reach these issues in light of our dispo-

I

In holding that ground water is not an article of commerce, the Nebraska Supreme Court and appellee cite as controlling precedent *Hudson County Water Co.* v. *McCarter*, 209 U. S. 349 (1908). In that case a New Jersey statute prohibited the interstate transfer of any surface water located within the State.[4] The Hudson County Water Company nevertheless contracted with New York City to supply one of its boroughs with water from the Passaic River in New Jersey. The state attorney general sought from the New Jersey courts an injunction against fulfillment of the contract. Over the water company's objections that the statute impaired the obligation of contract, took property without just compensation, interfered with interstate commerce, denied New York citizens the privileges afforded New Jersey citizens, and denied New York citizens the equal protection of the laws, the injunction was granted. This Court, in an opinion by Justice Holmes, affirmed.

Most of the Court's opinion addresses the just compensation claim. Justice Holmes refused to ground the Court's holding, as did the New Jersey state courts,[5] on "the more or

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sition of the Commerce Clause claim.

[4] The Court quoted the statute: "It shall be unlawful for any person or corporation to transport or carry, through pipes, conduits, ditches or canals, the waters of any fresh water lake, pond, brook, creek, river or stream of this State into any other State, for use therein." 209 U. S., at 353.

[5] "The Courts below assumed or decided and we shall assume that the

less attenuated residuum of title that the State may be said to possess." *Id.*, at 355. For the statute was justified as a regulatory measure that, on balance, did not amount to a taking of property that required just compensation. Putting aside the "problems of irrigation," the State's interest in preserving its waters was well within its police power.[6] That interest was not dependent on any demonstration that the State's water resources were inadequate for present or future use. The State "finds itself in possession of what all admit to be a great public good, and what it has it may keep and give no one a reason for its will." *Id.*, at 357.

Having disposed of the just compensation claim, Justice Holmes turned very briefly to the other constitutional challenges. In one paragraph, he rejected the Contract Clause claim. In the remaining paragraph of the opinion, he rejected all the other defenses. His treatment of the Commerce Clause challenge consists of three sentences: "A man

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defendant represents the rights of a riparian proprietor, and on the other hand, that it represents no special chartered powers that give it greater rights than those. On these assumptions the Court of Errors and Appeals pointed out that a riparian proprietor has no right to divert waters for more than a reasonable distance from the body of the stream or for other than the well-known ordinary uses, and that for any purpose anywhere he is narrowly limited in amount. It went on to infer that his only right in the body of the stream is to have the flow continue, and that there is a residuum of public ownership in the State. It reinforced the State's rights by the State's title to the bed of the stream where flowed by the tide, and concluded from the foregoing and other considerations that, as against the rights of riparian owners merely as such, the State was warranted in prohibiting the acquisition of the title to water on a larger scale." *Id.*, at 354.

[6] "The problems of irrigation have no place here. Leaving them on one side, it appears to us that few public interests are more obvious, indisputable and independent of particular theory than the interest of the public of a State to maintain the rivers that are wholly within it substantially undiminished, except by such drafts upon them as the guardian of the public welfare may permit for the purpose of turning them to a more perfect use." *Id.*, at 356.

cannot acquire a right to property by his desire to use it in commerce among the States. Neither can he enlarge his otherwise limited and qualified right to the same end. The case is covered in this respect by *Geer* v. *Connecticut*, 161 U. S. 519 [(1896)]." 209 U. S., at 357.

While appellee relies upon *Hudson County*, appellants rest on our summary affirmance of a three-judge district court judgment in *City of Altus* v. *Carr*, 255 F.Supp. 828 (W.D. Tex.), aff'd mem., 385 U. S. 35 (1966). The City of Altus is located near the southern border of Oklahoma. Large population increases rendered inadequate its source of municipal water. It consequently obtained from the owners of land in an adjoining Texas county the contractual right to pump the ground water underlying that land and to transport it across the border. The Texas legislature thereafter enacted a statute that forbade the interstate exportation of ground water without the approval of that body.[7] The City filed suit in federal district court, claiming that the statute violated the Commerce Clause.

The City relied upon *West* v. *Kansas Natural Gas Co.*, 221 U. S. 229 (1910), which invalidated an Oklahoma statute that prevented the interstate tranfer of natural gas produced within the State,[8] and *Pennsylvania* v. *West Virginia*, 262 U. S. 553 (1923), which invalidated a West Virginia statute that accorded a preference to the citizens of that State in the purchase of natural gas produced therein.[9] The Texas attorney general defended the statute on two grounds. First, he asserted that its purpose was to conserve and protect the State's water resources by regulating the withdrawal of ground water. The district court rejected that defense because similar conservation claims had met defeat in *West* v. *Kansas Natural Gas Co.*, *supra*, and *Pennsylvania* v. *West Virginia*, *supra*.[10] Second, the State argued that the statute regulated ground water and that ground water is not an article of commerce, citing *Geer* v. *Connecticut*, *supra*, and *Hudson County*, *supra*. The court rejected this argument since the statute directly regulated the interstate transportation of water that had been pumped from the ground, and under Texas law such water was an article of commerce. The court then had little difficulty in concluding that the statute imposed an impermissible burden on interstate commerce.[11]

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[7] The district court quoted the statute: "No one shall withdraw water from any underground source in this State for use in any other state by drilling a well in Texas and transporting the water outside the boundaries of the State unless the same be specifically authorized by an Act of the Texas Legislature and thereafter as approved by it." 255 F.Supp., at 830.

[8] Justice Holmes, the author of the Court's opinion in *Hudson County*, noted his dissent. See 221 U. S., at 262.

[9] Justice Holmes dissented, expressing the view that the Court's decision was inconsistent with *Hudson County*. See 262 U. S., at 603.

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[10] The district court opinion, 255 F.Supp., at 839, included these quotations from the two cases:

"The statute of Oklahoma recognizes [natural gas] to be a subject of intrastate commerce, but seeks to prohibit it from being the subject of interstate commerce, and this is the purpose of its conservation. In other words, the purpose of its conservation is in a sense commercial—the business welfare of the state, as coal might be, or timber. Both of these products might be limited in amount, and the same consideration of the public welfare which would confine gas to the use of the inhabitants of a state would confine them to the inhabitants of the state. If the states have such power, a singular situation might result. Pennsylvania might keep its coal, the Northwest its timber, the mining states their minerals. And why may not the products of the field be brought within the principle?" *West* v. *Kansas Natural Gas Co.*, 221 U. S. 229, 255 (1910).

"Another consideration advanced to the same end is that natural gas is a natural product of the state and has become a necessity therein, that the supply is waning and no longer sufficient to satisfy local needs and be used abroad, and that the act is therefore a legitimate measure of conservation in the interest of the people of the state. If the situation be as stated, it affords no ground for the assumption by the state of the power to regulate interstate commerce, which is what the act attempts to do. That power is lodged elsewhere." *Pennsylvania* v. *West Virginia*, 262 U. S. 553, 598 (1923).

[11] "Considering the statute in question only with regard to whether it

In summarily affirming the district court in *City of Altus*, we did not necessarily adopt the court's reasoning. Our affirmance indicates only our agreement with the result reached by the district court. *Metromedia, Inc.* v. *City of San Diego*, 453 U. S. 490, 499 (1981). That result is not necessarily inconsistent with the Nebraska Supreme Court's holding in this case. For Texas law differs significantly from Nebraska law regarding the rights of a surface owner to ground water that he has withdrawn. According to the district court in *City of Altus*, the "rule in Texas was that an owner of land could use all of the percolating water he could capture from the wells on his land for whatever beneficial purposes he needed it, on or off the land, and could likewise sell it to others for use on or off the land and outside the basin where produced, just as he could sell any other species of property." 255 F.Supp., at 833, n. 8. Since ground water, once withdrawn, may be freely bought and sold in States that follow this rule, in those States ground water is appropriately regarded as an article of commerce. In Nebraska the surface owner has no comparable interest in ground water. As explained by the Nebraska Supreme Court, "'the owner of land is entitled to appropriate subterranean waters found under his land, but he cannot extract and appropriate them in

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regulates the transportation and use of water after it has been withdrawn from a well and becomes personal property, such statute constitutes an unreasonable burden upon and interference with interstate commerce. Moreover, on the facts of this case it appear to us that [the Texas statute] does not have for its purpose, nor does it operate to conserve water resources of the State of Texas except in the sense that it does so for her own benefit to the detriment of her sister States as in the case of West v. Kansas Natural Gas Co. In the name of conservation, the statute seeks to prohibit interstate shipments of water while indulging in the substantial discrimination of permitting the unrestricted intrastate production and transportation of water between points within the State, no matter how distant; for example, from Wilbarger County to El Paso County, Texas. Obviously, the statute had little relation to the cause of conservation." 255 F.Supp., at 839-840.

excess of a reasonable and beneficial use upon the land which he owns, especially if such use is injurious to others who have substantial rights to the waters, and if the natural underground supply is insufficient for all owners, each is entitled to a reasonable proportion of the whole.'" 208 Neb., at 705, 305 N.W. 2d, at 617 (quoting *Olson* v. *City of Wahoo*, 124 Neb. 802, 811, 248 N.W. 304, 308 (1933)).

City of Altus, however, is inconsistent with *Hudson County*. For in the latter case the Court found *Geer* v. *Connecticut*, *supra*, to be controlling on the Commerce Clause issue. *Geer*, which sustained a Connecticut ban on the interstate transportation of game birds captured in that State, was premised on the theory that the State owned its wild animals and therefore was free to qualify any ownership interest it might recognize in the persons who capture them. One such restriction is a prohibition against interstate transfer of the captured animals. This theory of public ownership was advanced as a defense in *City of Altus*. The State argued that it owned all subterranean water and therefore could recognize ownership in the surface owner who withdraws the water, but restrict that ownership to use of the water within the State. That theory, upon which the Commerce Clause issue in *Hudson County* was decided, was rejected by the district court in *City of Altus*.[12] In expressly overruling *Geer* three years ago, this Court traced the demise of the public ownership theory and definitively recast it as "'but a fiction expressive in legal shorthand of the importance to its people that a State have power to preserve and regulate the exploitation of an important resource.'" *Hughes* v. *Oklahoma*, 441 U. S. 322, 334 (1979) (quoting *Toomer* v. *Witsell*, 334 U. S. 385, 402 (1948)). See also *Baldwin* v. *Montana Fish and Game Comm'n*, 436 U. S. 371, 384–387 (1978); *Douglas* v. *Seacoast Products, Inc.*, 431 U. S. 265, 284–285 (1977). In *Hughes* the Court found the State's interests insufficient to sustain a ban on the interstate transfer of natural minnows seined from waters within the State.

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[12] "This statute, however, seeks to prohibit the production of underground water for the purpose of transporting same in interstate commerce, and has the effect of prohibiting the interstate transportation of such water after it has become personal property. Whether a statute by its phraseology prohibits the interstate transportation of an article of commerce after it has become the personal property of someone as in the Pennsylvania and West cases, or prohibits the withdrawal of such substance where the intent is to transport such in interstate commerce, the result upon interstate commerce is the same. In both situations, the purpose and intent of the statute and the end result thereof is to prohibit the interstate transportation of an article of commerce." *Id.*, at 840.

Appellee insists, however, that Nebraska water is distinguishable from other natural resources. The surface owner who withdraws Nebraska ground water enjoys a lesser ownership interest in the water than the captor of game birds in Connecticut or minnows in Oklahoma or ground water in Texas, for in *Geer*, *Hughes*, and *City of Altus* the States permitted intrastate trade in the natural resources once they were captured. Although appellee's greater ownership interest may not be irrelevant to Commerce Clause analysis, it does not absolutely remove Nebraska ground water from such scrutiny. For appellee's argument is still based on the legal fiction of state ownership. The fiction is illustrated by municipal water supply arrangements pursuant to which ground water is withdrawn from rural areas and transferred to urban areas. Such arrangements are permitted in Nebraska, see *Metropolitan Utilities District* v. *Merritt Beach Co.*, 173 Neb. 783, 140 N.W. 2d 626 (1966), but the Nebraska Supreme Court distinguished them on the ground that the transferror was only permitted to charge as a price for the water his costs of distribution and not the value of the water itself. 208 Neb., at 708, 305 N.W. 2d, at 618. Unless demand is greater than supply, however, this reasoning does not distinguish minnows, the price of which presumably is derived from the costs of seining and of transporting the catch to market. Even in cases of shortage, in which the seller of the natural resource can demand a price that exceeds his costs, the State's rate structure that requires the price to be cost-justified is economically comparable to price regulation. A State's power to regulate prices or rates has never been thought to depend on public ownership of the controlled commodity. It would be anomalous if federal power to regulate economic transactions in natural resources depended on the characterization of the payment as compensation for distribution services, on the one hand, or as the price of goods, on the other. Cf. *In re Rahrer*, 140 U. S. 545, 558 (1891).

The second asserted distinction is that water, unlike other natural resources, is essential for human survival. Appellee, and the *amici curiae* that are vitally interested in conserving and preserving scarce water resources in the arid Western States, have convincingly demonstrated the desirability of state and local management of ground water.[13] But the States' interests clearly have an interstate dimension. Although water is indeed essential for human survival, studies indicate that over 80% of our water supplies is used for agricultural purposes.[14] The agricultural markets supplied by irrigated farms are worldwide. They provide the archtypical example of commerce among the several States for which the Framers of our Constitution intended to authorize federal regulation. The multistate character of the Ogallala aquifer—underlying appellants' tracts of land in Colorado and Nebraska, as well as parts of Texas, New Mexico, Oklahoma, and Kansas[15]—confirms the view that there is a significant federal interest in conservation as well as in fair allocation of this diminishing resource. Cf. *Arizona* v. *California*, 373 U. S. 546 (1963).

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[13] In *California* v. *United States*, 438 U. S. 645, 648 (1978), we explained some of the circumstances that support a general policy of local water management under differing legal systems:

"The very vastness of our territory as a Nation, the different times at which it was acquired and settled, and the varying physiographic and climate regimes which obtain in its different parts have all but necessitated the recognition of legal distinctions corresponding to these differences. Those who first set foot in North America from ships sailing the tidal estuaries of Virginia did not confront the same problems as those who sailed flat boats down the Ohio River in search of new sites to farm. Those who cleared the forests in the old Northwest Territory faced totally different physiographic problems from those who built sod huts on the Great Plains. The final expansion of our Nation in the 19th century into the arid lands beyond the hundredth meridian of longitude, which had been shown on early maps as the 'Great American Desert,' brought the participants in that expansion face to face with the necessity for irrigation in a way that no previous territorial expansion had."

The Western States' interests, and their asserted superior competence, in conserving and preserving scarce water resources are not irrelevant in the Commerce Clause inquiry. Nor is appellee's claim to public ownership without significance. Like Congress' deference to state water law, see *infra*, at 16–18, these factors inform the determination whether the burdens on commerce imposed by state ground water regulation are reasonable or unreasonable. But appellee's claim that Nebraska ground water is not an article of commerce goes too far: it would not only exempt Nebraska ground water regulation from burden-on-commerce analysis, it also would curtail the affirmative power of Congress to implement its own policies concerning such regulation. See *Philadelphia* v. *New Jersey*, 437 U. S. 617, 621–623 (1978). If Congress chooses to legislate in this area under its commerce power, its regulation need not be more limited in Nebraska than in Texas and States with similar property laws.

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[14] Soil Conservation Service, U. S. Dept. of Agriculture, America's Soil and Water: Conditions and Trends 21 (1980).

[15] Comptroller General, Ground Water Overdrafting Must Be Controlled 7–8 (1980).

Ground water overdraft is a national problem and Congress has the power to deal with it on that scale.

II

Our conclusion that water is an article of commerce raises, but does not answer, the question whether the Nebraska statute is unconstitutional. For the existence of unexercised federal regulatory power does not foreclose state regulation of its water resources, of the uses of water within the State, or indeed, of interstate commerce in water. *Southern Pacific Co.* v. *Arizona*, 325 U. S. 761, 766–767 (1945); *United States* v. *South-Eastern Underwriters Assn.*, 322 U. S. 533, 548–549 (1944); *Cooley* v. *Board of Wardens*, 12 How. 299, 319 (1851). Determining the validity of state statutes affecting interstate commerce requires a more careful inquiry:

> "Where the statute regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits. If a legitimate local purpose is found, then the question becomes one of degree. And the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities." *Pike* v. *Bruce Church, Inc.*, 397 U. S. 137, 142 (1970) (citation omitted).

The only purpose that appellee advances for § 46–613.01 is to conserve and preserve diminishing sources of ground water. The purpose is unquestionably legitimate and highly important,[18] and the other aspects of Nebraska's ground water regulation demonstrate that it is genuine. Appellants' land in Nebraska is located within the boundaries of the Upper Republican Ground Water Control Area, which was designated as such by the Director of the Nebraska Department of Water Resources based upon a determination "that there is an inadequate ground water supply to meet present or reasonably foreseeable needs for beneficial use of such water supply." Neb. Rev. Stat. § 46-658(1); see App. 56-60. Pursuant to § 46-666(1), the Upper Republican Natural Resources District has promulgated special rules and regulations governing ground water withdrawal and use. See App. 61-82. The rules and regulations define as "critical" those townships in the control area in which the annual decline of the ground water table exceeds a fixed percentage; appellants' Nebraska tract is located within a critical township. The rules and regulations require the installation of flow meters on every well within the control area, specify the amount of water per acre that may be used for irrigation, and set the spacing that is required between wells. They also strictly limit the intrastate transfer of ground water: transfers are only permitted between lands controlled by the same groundwater user, and all transfers must be approved by the district board of directors. *Id.*, at 68-69.

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[18] See *Cities Service Gas Co.* v. *Peerless Oil & Gas Co.*, 340 U. S. 179, 188 (1950) ("Insofar as conservation is concerned, the national interest and the interest of producing states may well tend to coincide.").

The State's interest in conservation and preservation of ground water is advanced by the first three conditions in § 46-613.01 for the withdrawal of water for an interstate transfer. Those requirements are "that the withdrawal of the ground water requested is reasonable, is not contrary to the conservation and use of ground water, and is not otherwise detrimental to the public welfare." Although Commerce Clause concerns are implicated by the fact that § 46-613.01 applies to interstate transfers but not to intrastate transfers, there are legitimate reasons for the special treatment accorded requests to transport ground water across state lines. Obviously, a State that imposes severe withdrawal and use restrictions on its own citizens is not discriminating against interstate commerce when it seeks to prevent the uncontrolled transfer of water out of the State. An exemption for interstate transfers would be inconsistent with the ideal of evenhandedness in regulation. At least in the area in which appellants' Nebraska tract is located, the first three standards of §46–613.01 may well be no more strict in application than the limitations upon intrastate transfers imposed by the Upper Republican Natural Resources District.

Moreover, in the absence of a contrary view expressed by Congress, we are reluctant to condemn as unreasonable measures taken by a State to conserve and preserve for its own citizens this vital resource in times of severe shortage. Our reluctance stems from the "confluence of [several] realities." *Hicklin* v. *Orbeck*, 437 U. S. 518, 534 (1978). First, a State's power to regulate the use of water in times and places of shortage for the purpose of protecting the health of its citizens—and not simply the health of its economy—is at the core of its police power. For Commerce Clause purposes, we have long recognized a difference between economic protectionism, on the one hand, and health and safety regulation, on the other. See *H. P. Hood & Sons* v. *Du Mond*, 336 U. S. 525, 533 (1949). Second, the legal expectation that under cetain circumstances each State may restrict water within its borders has been fostered over the years not only by our equitable apportionment decrees, see, *e. g.*, *Wyoming* v. *Colorado*, 353 U. S. 953 (1957), but also by the negotiation and enforcement of interstate compacts. Our law therefore has recognized the relevance of state boundaries in the allocation of scarce water resources. Third, although appellee's claim to public ownership of Nebraska ground water cannot justify a total denial of federal regulatory power, it may support a limited preference for its own citizens in the utilization of the resource. See *Hicklin* v. *Orbeck*, *supra*, at 533–534. In this regard, it is relevant that appellee's claim is logically more substantial than claims to public ownership of other natural resources. See *supra*, at 7–9. Finally, given appellee's conservation efforts, the continuing availability of ground water in Nebraska is not simply happenstance; the natural resource has some indicia of a good publicly produced and owned in which a State may favor its own citizens in times of shortage. See *Reeves, Inc.* v. *Stake*, 447 U. S. 429 (1980); cf. *Philadelphia* v. *New Jersey*, *supra*, at 627–628 and n. 6; *Baldwin* v. *Fish and Game Comm'n*, *supra*. A facial examination of the first three conditions set forth in § 46–613.01 does not, therefore, indicate that they impermissibly burden interstate commerce. Appellants, indeed, seem to concede their reasonableness.

Appellants, however, do challenge the requirement that "the state in which the water is to be used grants reciprocal rights to withdraw and transport ground water from that state for use in the State of Nebraska"—the reciprocity provision that troubled the Chief Justice of the Nebraska Supreme Court. Because Colorado forbids the exportation of its ground water,[17] the reciprocity provision operates as an explicit barrier to commerce between the two States. The State therefore bears the initial burden of demonstrating a close fit between the reciprocity requirement and its asserted local purpose. *Hughes* v. *Oklahoma*, *supra*, at 336; *Dean Milk Co.* v. *City of Madison*, 340 U. S. 349, 354 (1951).

The reciprocity requirement fails to clear this initial hurdle. For there is no evidence that this restriction is narrowly tailored to the conservation and preservation rationale. Even though the supply of water in a particular well may be abundant, or perhaps even excessive, and even though the most beneficial use of that water might be in another State, such water may not be shipped into a neighboring State that does not permit its water to be used in Nebraska. If it could be shown that the State as a whole suffers a water shortage, that the intrastate transportation of water from areas of abundance to areas of shortage is feasible regardless of distance, and that the importation of water from adjoining States would roughly compensate for any exportation to those States, then the conservation and preservation purpose might be credibly advanced for the reciprocity provision. A demonstrably arid state conceivably might be able to marshall evidence to establish a close means-end relationship between even a total ban on the exportation of water and a purpose to conserve and preserve water. Appellee, however, does not claim that such evidence exists. We therefore are not persuaded that the reciprocity requirement—when superimposed on the first three restrictions in the statute—significantly advances the State's legitimate conservation and preservation interest; it surely is not narrowly tailored to serve that purpose. The reciprocity requirement does not survive the "strictest scrutiny" reserved for facially discriminatory legislation. *Hughes* v. *Oklahoma*, *supra*, at 337.[18]

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[17] Colo. Rev. Stat. § 37–90–136 provides as follows:

"For the purpose of aiding and preserving unto the state of Colorado and all its citizens the use of all ground waters of this state, whether tributary or nontributary to a natural stream, which waters are necessary for the health and prosperity of all the citizens of the state of Colorado, and for the growth, maintenance, and general welfare of the state, it is unlawful for any person to divert, carry, or transport by ditches, canals, pipelines, conduits, or any other manner any of the ground waters of this state, as said waters are in this section defined, into any other state for use therein."

III

Appellee's suggestion that Congress has authorized the States to impose otherwise impermissible burdens on interstate commerce in ground water is not well-founded. The suggestion is based on 37 statutes in which Congress has deferred to state water law, and on a number of interstate compacts dealing with water that have been approved by Congress.

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[18] The reciprocity requirement cannot, of course, be justified as a response to another State's unreasonable burden on commerce. *A & P Tea Co.* v. *Cottrell*, 424 U. S. 366, 379-381 (1976).

Abstracts of the relevant sections of the 37 statutes relied upon by appellee were submitted in connection with the Hearings on S. 1275 before the Senate Subcommittee on Irrigation and Reclamation, 88th Cong., 2d Sess., 302–310 (1964). Appellee refers the Court to that submission but only discusses §8 of the Reclamation Act of 1902, 32 Stat. 390. That section, it turns out, is typical of the other 36 statutes. It contains two parts. The first provides that "nothing in this Act shall be construed as affecting or intended to affect or to in any way interfere with the laws of any State or Territory relating to the control, appropriation, use, or distribution of water used in irrigation." Such language defines the extent of the federal legislation's preemptive effect on state law. *New England Power Co.* v. *New Hampshire*, —— U. S. ——, —— (1982); *Lewis* v. *BT Investment Managers, Inc.*, 447 U. S. 27, 49 (1980). The second part provides that "the Secretary of Interior, in carrying out the provisions of this Act, shall proceed in conformity with such laws." Such language mandates that questions of water rights that arise in relation to a federal project are to be determined in accordance with state law. See *California* v. *United States*, 438 U. S. 645 (1978).

The interstate compacts to which appellee refers are agreements among States regarding rights to surface water. See The Council of State Governments, Interstate Compacts and Agencies 25–29, 31–32 (1979). Appellee emphasizes a compact between Nebraska and Colorado involving water rights to the South Platte River, see 44 Stat. 195 (1926), and a compact among Nebraska, Colorado, and Kansas involving water rights to the Republican River, see 57 Stat. 86 (1943).

Although the 37 statutes and the interstate compacts demonstrate Congress' deference to state water law,[19] they do not indicate that Congress wished to remove federal constitutional constraints on such state laws. The negative implications of the Commerce Clause, like the mandates of the Fourteenth Amendment, are ingredients of the *valid* state law to which Congress has deferred. Neither the fact that Congress has chosen not to create a federal water law to govern water rights involved in federal projects, nor the fact that Congress has been willing to let the States settle their differences over water rights through mutual agreement,[20] constitutes persuasive evidence that Congress consented to the unilateral imposition of unreasonable burdens on commerce. In the instances in which we have found such consent, Congress' "'intent and policy' to sustain state legislation from attack under the Commerce Clause" was "'expressly stated.'" *New England Power Co.* v. *New Hampshire, supra*, at —— (quoting *Prudential Ins. Co.* v. *Benjamin*, 328 U. S. 408, 427 (1946)).[21] Cf. *Merrion* v. *Jicarilla Apache Tribe*, —— U. S. ——, ——, n. 21 (1982).

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[19] "The history of the relationship between the Federal Government and the States in the reclamation of the arid lands of the Western States is both long and involved, but through it runs the consistent thread of purposeful

The reciprocity requirement of Neb. Rev. Stat. § 46-613.01 violates the Commerce Clause. We leave to the state courts the question whether the invalid portion is severable. The judgment of the Nebraska Supreme Court is reversed and the case is remanded for proceedings not inconsistent with this opinion.

It is so ordered.

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and continued deference to state water law by Congress." *California* v. *United States, supra*, at 653.

[20] Similarly, this Court has encouraged States to resolve their water disputes through interstate compacts rather than by equitable apportionment adjudication. See *Colorado* v. *Kansas*, 320 U. S. 383, 392 (1943).

[21] See, *e. g.*, *Prudential Ins. Co.* v. *Benjamin*, 328 U. S. 408 (1946) (McCarran Act, 59 Stat. 33 (1945)); *International Shoe Co.* v. *Washington*, 326 U. S. 310 (1945) (§ 1606(a) of the Internal Revenue Code, 53 Stat. 1391 (1939)); *Whitfield* v. *Ohio*, 297 U. S. 431 (1936) (Hawes-Cooper Act, 45 Stat. 1084 (1929)); *In re Rahrer*, 140 U. S. 545 (1891) (Wilson Act, 26 Stat. 313 (1890)).

SUPREME COURT OF THE UNITED STATES

No. 81-613

JOY SPORHASE AND DELMER MOSS, ETC., APPELLANTS *v.* NEBRASKA, EX REL., PAUL L. DOUGLAS, ATTORNEY GENERAL

APPEAL FROM THE SUPREME COURT OF NEBRASKA

[July 2, 1982]

JUSTICE REHNQUIST, with whom JUSTICE O'CONNOR joins, dissenting.

The issue presented by this case, and the only issue, is whether the existence of the Commerce Clause of the United States Constitution by itself, in the absence of any action by Congress, invalidates some or all of § 46-613.01 of the Nebraska Revised Statutes, which relates to groundwater. But instead of confining its opinion to this question, the Court first quite gratuitously undertakes to answer the question of whether the authority of Congress to regulate interstate commerce, conferred by the same provision of the Constitution, would enable it to legislate with respect to groundwater overdraft in some or all of the States.

That these two questions are quite distinct leaves no room for doubt. Congress may regulate not only the stream of commerce itself, but activities which affect interstate commerce, including wholly intrastate activities. See, *e. g.*, *Kirschbaum Co.* v. *Walling*, 316 U. S. 517 (1942); *United States* v. *Darby*, 312 U. S. 100 (1941); *Houston & Texas Ry.* v. *United States*, 234 U. S. 342 (1914). The activity upon which the regulatory effect of the congressional statute falls in many of these cases does not directly involve articles of commerce at all. For example, in *Kirschbaum*, the employees were engaged in the operation and maintenance of a loft building in which large quantities of goods for interstate commerce were produced; no one contended that these employees themselves, or the work which they actually performed, dealt with articles of commerce. Nonetheless, the provisions of the Fair Labor Standards Act were applied to them because Congress extended the terms of the Act not only to those who were "engaged in commerce" but to those who were engaged "in the production of goods for commerce." *Id.*, at 522.

Thus, the authority of Congress under the power to regulate interstate commerce may reach a good deal further than the mere negative impact of the Commerce Clause in the absence of any action by Congress. Upon a showing that groundwater overdraft has a substantial economic effect on interstate commerce, for example, Congress arguably could regulate groundwater overdraft, even if groundwater is not an "article of commerce" itself. See, *e. g.*, *Hodel* v. *Virginia Surface Mining & Recl. Assn.*, 452 U. S. 264, 281–283 (1981); *id.*, at 310–313 (REHNQUIST, J., concurring in judgment); *Wickard* v. *Filburn*, 317 U. S. 111 (1942). It is therefore wholly unnecessary to decide whether Congress could regulate groundwater overdraft in order to decide this case; since Congress has not undertaken such a regulation, I would leave the determination of its validity until such time as it is necessary to decide that question.

The question actually involved in this case is whether Neb. Rev. Stat. § 46–613.01 runs afoul of the unexercised authority of Congress to regulate interstate commerce. While the Court apparently agrees that our equitable apportionment decrees in cases such as *Wyoming* v. *Colorado*, 353 U. S. 953 (1957), and the execution and approval of interstate compacts apportioning water have given rise to "the legal expectation that under certain circumstances each State may restrict water within its borders," *ante*, at 14, it insists on an elaborate balancing process in which the State's "interest" is weighed under traditional Commerce Clause analysis.

I think that in more than one of our cases in which a State has invoked our original jurisdiction, the unsoundness of the Court's approach is manifest. For example, in *Georgia* v. *Tennessee Copper Co.*, 206 U. S. 230, 237 (1907), the Court said:

> "This is a suit by a State for an injury to it in its capacity of *quasi*-sovereign. In that capacity the State has an interest independent of and behind the titles of its citizens, in all the earth and air within its domain. It has the last word as to whether its mountains shall be stripped of their forests and its inhabitants shall breathe pure air."

Five years earlier, in *Kansas* v. *Colorado*, 185 U. S. 125, 142, 145–146 (1902), the Court had made clear that a State's quasi-sovereign interest in the flow of surface and subterranean water within its borders was of the same magnitude as its interest in pure air or healthy forests.

In my view, these cases appropriately recognize the traditional authority of a State over resources within its boundaries which are essential not only to the well-being, but often to the very lives of its citizens. In the exercise of this authority, a State may so regulate a natural resource so as to preclude that resource from attaining the status of an "article of commerce" for the purposes of the negative impact of the Commerce Clause. It is difficult, if not impossible, to conclude that "commerce" exists in an item that cannot be reduced to possession under state law and in which the State recognizes only a usufructuary right. "Commerce" cannot exist in a natural resource that cannot be sold, rented, traded, or transferred, but only *used*.

Of course, a State may not discriminate against interstate commerce when it regulates even such a resource. If the State allows indiscriminate intrastate commercial dealings in a particular resource, it may have a difficult task proving that an outright prohibition on interstate commercial dealings is not such a discrimination. I had thought that this was the basis for this Court's decisions in *Hughes* v. *Oklahoma*, 441 U. S. 322 (1979), *Pennsylvania* v. *West Virginia*, 262 U. S. 553 (1923), and *West* v. *Kansas Nat. Gas Co.*, 221 U. S. 229 (1911). In each case, the State permitted a natural resource to be reduced to private possession, permitted an *intrastate* market to exist in that resource, and either barred *interstate* commerce entirely or granted its residents a commercial preference.[1]

By contrast, Nebraska so regulates groundwater that it cannot be said that the State permits any "commerce," intrastate or interstate, to exist in this natural resource. As with almost all of the Western States, Nebraska does not recognize an absolute ownership interest in groundwater, but grants landowners only a right to *use groundwater on the land from which it has been extracted.* Moreover, the landowner's right to use groundwater is limited. Nebraska landowners may not extract groundwater "in excess of a reasonable and beneficial use upon the land in which he owns, especially if such use is injurious to others who have substantial rights to the waters, and if the natural underground supply is insufficient for all owners, each is entitled to a reasonable proportion of the whole." *Olson* v. *City of Wahoo*, 124 Neb. 802, 811, 248 N.W. 304, 308 (1933). With the exception of municipal water systems, Nebraska forbids any transportation of groundwater off the land owned or controlled by the person who has appropriated the water from its subterrranean source. *State ex. rel. Douglas* v. *Sporhase*, 208 Neb. 703, 710; 305 N.W. 2d 614, 619 (1981). See App. 68–69.

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[1] Similarly, in *City of Altus* v. *Carr*, 255 F. Supp. 828 (W.D. Tex.), aff'd mem., 385 U. S. 35 (1966), Texas placed no restrictions upon the use or the intrastate sale of groundwater. The "rule in Texas was that an owner of land could use all of the percolating water he could capture from the wells on his land for whatever beneficial purposes he needed it, on or off the land, and could likewise sell it to others for use on or off the land and outside the basin where produced, just as he could sell any other species of property." 255 F. Supp., at 833, n. 8. Texas' absolute ownership rule is an anomaly among the Western States. See 5 R. E. Clark, Waters and Water Rights § 441 (1972 & 1978 Supp.). In Nebraska, as in most of the Western States, groundwater is not treated as "any other species of property."

Nebraska places additional restrictions on groundwater users within certain areas, such as the portion of appellant's land situated in Nebraska, where the shortage of groundwater is determined to be critical. Water users in appellants' district are permitted only to irrigate the acreage irrigated in 1977, or the average number of acres irrigated between 1972 and 1976, whichever is greater, and must obtain permission from the water district's board before any additional acreage may be placed under irrigation. The amount of groundwater that may be extracted is strictly limited on an acre-inch-per-irrigated acre basis. There are also detailed regulations as to the spacing of wells and the use and operation of flow meters. App. 71–82.

Since Nebraska recognizes only a limited right to use groundwater on land owned by the appropriator, it cannot be said that "commerce" in groundwater exists as far as Nebraska is concerned. Therefore, it cannot be said that Neb. Rev. Stat. § 46–613.01 either discriminates against, or "burdens," interstate commerce. Section 46–613.01 is simply a regulation of the landowner's *right to use* groundwater extracted from lands he owns within Nebraska.[2] Unlike the

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[2] Unlike several other Western States, Nebraska does not entirely forbid groundwater extracted in Nebraska to be used in other States. See Brief for the City of El Paso as *Amicus Curiae* 2, n. 3. As noted by the Court, Nebraska merely places conditions on such a use of the State's groundwater. A permit must be obtained from the Nebraska Department of Water Resources. If the requested withdrawal of groundwater is determined to be "reasonable, not contrary to the conservation and use of ground water, and . . . not otherwise detrimental to the public welfare," a permit will be issued so long as the "state in which the water is to be used grants reciprocal rights to withdraw and transport ground water from that

Court, I cannot agree that Nebraska's limitation upon a landowner's right to extract water from his land situated in Nebraska *for his own use* on land he owns in an adjoining State runs afoul of Congress' unexercised authority to regulate interstate commerce.[3]

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state for use in the State of Nebraska." Id. § 46-613.01.

[3] The Court today invalidates only the reciprocity provision in § 46-613.01. *Ante*, at 15-16. Appellants, however, have never applied for the permit required by the Nebraska statute. I see nothing in the Court's opinion that would preclude the Nebraska Department of Water Resources from prohibiting appellants from transporting groundwater into the Colorado portion of their land until they obtain the permit required by the statute. I also see nothing in the Court's opinion that would preclude the Department of Water Resources from denying appellants a permit because of a failure to satisfy the remaining conditions in the statute.

981/81-614

(Slip Opinion)

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Lumber Co.*, 200 U. S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

GRIFFIN v. OCEANIC CONTRACTORS, INC.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 81-614. Argued April 26, 1982—Decided June 30, 1982

Title 46 U. S. C. § 596, after obligating the master or owner of a vessel making coasting or foreign voyages to pay a seaman's unpaid wages within specified periods after his discharge, provides that a master or owner who fails to make such payment "without sufficient cause shall pay to the seaman a sum equal to two days' pay for each and every day during which payment is delayed beyond the respective periods." Petitioner, who was injured while working aboard respondent's vessel in foreign waters, brought suit under the Jones Act and general maritime law in Federal District Court after respondent refused to pay his medical expenses and to furnish transportation back to the United States. In addition to damages, petitioner sought to recover penalty wages under § 596 for respondent's failure to pay $412.50 in earned wages allegedly due upon discharge. The court found, *inter alia*, that petitioner had been discharged from respondent's employ on the day of the injury, and that respondent's failure to pay petitioner the $412.50 was "without sufficient cause." In assessing the penalty wages at $6,881.60, the court held that "[t]he period during which the penalty runs is to be determined by the sound discretion of the district court and depends on the equities of the case." It determined that the appropriate penalty period was the 34-day period from the date of discharge through the date when petitioner began work for another company. Petitioner appealed the award of damages as inadequate, but the Court of Appeals affirmed.

Held: The district courts have no discretion to limit the period during which the wage penalty is assessed. Imposition of the penalty is mandatory for each day that payment is withheld in violation of § 596. Pp. 4–13.

(a) The words chosen by Congress, given their plain meaning, leave no room for the exercise of discretion either in deciding whether to exact

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payment or in choosing the period of days by which the payment is to be calculated. After the District Court found that respondent had refused to pay petitioner the balance of his earned wages promptly after discharge and that its refusal was "without sufficient cause," nothing in § 596's language vested the court with discretion to limit the penalty assessment to the period of petitioner's unemployment. Pp. 4–6.

(b) This is not the type of case where literal application of a statute would thwart its obvious purpose. Section 596's "evident purpose" is "to secure prompt payment of seamen's wages . . . and thus to protect them from the harsh consequences of arbitrary and unscrupulous action of their employers, to which, as a class, they are peculiarly exposed." *Collie* v. *Fergusson*, 281 U. S. 52, 55. Although the statute's purpose is remedial, Congress has chosen to secure that purpose through the use of potentially punitive sanctions designed to deter negligent or arbitrary delays in payment. The legislative history confirms that Congress intended the statute to mean exactly what its plain language says. Pp. 6–9.

(c) Nor is literal application of § 596 in this case precluded on the asserted ground that it would produce an absurd and unjust result which Congress could not have intended. Even though the penalty for respondent's failure to promptly pay the $412.50 in wages—if computed on the basis of the period from petitioner's discharge until the date respondent actually paid the wages by satisfying the District Court's judgment—would be over $300,000, awards made under § 596 were not intended to be merely compensatory. Since the District Court found that respondent's refusal to pay petitioner following his discharge was without sufficient cause, and since it made no finding that respondent's continuing delay in payment beyond the period petitioner was unable to work was for sufficient cause, its decision to limit the penalty was error. *Pacific Mail S.S. Co.* v. *Schmidt*, 241 U. S. 245. Pp. 9–13.

664 F. 2d 36, reversed and remanded.

REHNQUIST, J., delivered the opinion of the Court, in which BURGER, C. J., and BRENNAN, WHITE, MARSHALL, POWELL, and O'CONNOR, JJ., joined. STEVENS, J., filed a dissenting opinion, in which BLACKMUN, J., joined.

NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D.C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

SUPREME COURT OF THE UNITED STATES

No. 81-614

DANNY L. GRIFFIN, PETITIONER *v.* OCEANIC CONTRACTORS, INC.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

[June 30, 1982]

JUSTICE REHNQUIST delivered the opinion of the Court.

This case concerns the application of 46 U. S. C. §596, which requires certain masters and vessel owners to pay seamen promptly after their discharge and authorizes seamen to recover double wages for each day that payment is delayed without sufficient cause. The question is whether the district courts, in the exercise of discretion, may limit the period during which this wage penalty is assessed, or whether imposition of the penalty is mandatory for each day that payment is withheld in violation of the statute.

I

On February 18, 1976, petitioner signed an employment contract with respondent in New Orleans, agreeing to work as a senior pipeline welder on board vessels operated by respondent in the North Sea. The contract specified that petitioner's employment would extend "until December 15, 1976 or until Oceanic's 1976 pipeline committal in the North Sea is fulfilled, whichever shall occur first." App. 41. The contract also provided that respondent would pay for transportation to and from the work site, but that if petitioner quit the job prior to its termination date, or if his services were terminated for cause, he would be charged with the cost of transportation back to the United States. Respondent reserved the right to withhold $137.50 from each of petitioner's first four paychecks "as a cash deposit for the payment of your return transportation in the event you should become obligated for its payment." App. 47. On March 6, 1976, petitioner flew from the United States to Antwerp, Belgium, where he reported to work at respondent's vessel, the "Lay Barge 27," berthed in the Antwerp harbor for repairs.

On April 1, 1976, petitioner suffered an injury while working on the deck of the vessel readying it for sea. Two days later he underwent emergency surgery in Antwerp. On April 5, petitioner was discharged from the hospital and went to respondent's Antwerp office, where he spoke with Jesse Williams, the welding superintendent, and provided a physician's statement that he was not fit for duty. Williams refused to acknowledge that petitioner's injury was work-related and denied that respondent was liable for medical and hospital expenses, maintenance, or unearned wages. Williams also refused to furnish transportation back to the United States, and continued to retain $412.50 in earned wages that had been deducted from petitioner's first three paychecks for that purpose. Petitioner returned to his home in Houston, Texas, the next day at his own expense. He was examined there by a physician who determined that he would be able to resume work on May 3, 1976. On May 5, petitioner began working as a welder for another company operating in the North Sea.

In 1978 he brought suit against respondent under the Jones Act, 38 Stat. 1185, as amended, 46 U. S. C. § 688, and under general maritime law, seeking damages for respondent's failure to pay maintenance, cure, unearned wages, repatriation expenses, and the value of certain personal effects lost on board respondent's vessel. Petitioner also sought penalty wages under Rev. Stat. § 4529, as amended, 46 U. S. C. § 596, for respondent's failure to pay over the $412.50 in earned wages allegedly due upon discharge. The District Court found for petitioner and awarded damages totalling $23,670.40.

Several findings made by that court are particularly relevant to this appeal. First, the court found that petitioner's injury was proximately caused by an unseaworthy condition of respondent's vessel. App. 17, ¶10; 23, ¶6. Second, the court found that petitioner was discharged from respondent's employ on the day of the injury, and that the termination of his employment was caused solely by that injury. App. 18, ¶16; 21, ¶7.[1] Third, it found that respondent's failure to pay petitioner the $412.50 in earned wages was "without sufficient cause." App. 20, ¶20; 25, ¶11.[2] Finally, the court found that petitioner had exercised due diligence in attempting to collect those wages. App. 20, ¶21.

In assessing penalty wages under 46 U. S. C. §596, the court held that "[t]he period during which the penalty runs is to be determined by the sound discretion of the district court and depends on the equities of the case." App. 25, ¶11. It determined that the appropriate period for imposition of the penalty was from the date of discharge, April 1, 1976, through the date of petitioner's reemployment, May 5, 1976, a period of 34 days. Applying the statute, it computed a penalty of $6,881.60.[3] Petitioner appealed the award of damages as inadequate.

The Court of Appeals for the Fifth Circuit affirmed. 664 F. 2d 36 (1981). That court concluded, *inter alia*, that the

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[1] According to respondent, petitioner was not formally discharged until June 1, 1976, but his termination was made retroactive to April 1. Brief for Respondent 5.

[2] The court also found:

"Defendant did not begin a thorough investigation of plaintiff's claim until September 30, 1976. The investigation was not made with reasonable diligence. Defendant's failure to pay maintenance and cure, repatriation expenses, the cost of his personal effects, and earned and unearned wages to plaintiff constituted arbitrary, unreasonable, callous, and willful disregard of plaintiff's rights." App. 20, ¶21.

[3] The court found that the daily wage rate to be used in calculating the penalty was $101.20. In accordance with the statute, the court assessed a penalty of twice this rate ($202.40) for each of the 34 days of the penalty period.

District Court had not erred in limiting assessment of the penalty provided by 46 U. S. C. § 596 to the period beginning April 1 and ending May 5. The court recognized that the statute required payment of a penalty for each day during which wages were withheld until the date they were actually paid, which in this case did not occur until September 17, 1980, when respondent satisfied the judgment of the District Court. *Id.*, at 40; see App. 30. Nevertheless, the court believed itself bound by prior decisions within the circuit, which left calculation of the penalty period to the sound discretion of the district courts. 664 F. 2d, at 40. It concluded that the District Court in this case had not abused its discretion by assessing a penalty only for the period during which petitioner was unemployed.

We granted certiorari to resolve a conflict among the Circuits regarding the proper application of the wage penalty statute.[4] 454 U. S. —— (1981). We reverse the judgment of the Court of Appeals as to that issue.[5]

II

A

The language of the statute first obligates the master or owner of any vessel making coasting or foreign voyages to pay every seaman the balance of his unpaid wages within specified periods after his discharge.[6] It then provides:

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[4] The Courts of Appeals for the Third and Ninth Circuits have interpreted the statute to mandate imposition of the penalty for each day until the wages are paid and to leave no room for the district court's exercise of discretion. *Swain* v. *Isthmian Lines, Inc.*, 360 F. 2d 81 (CA3 1966); *Larkins* v. *Hudson Waterways Corp.*, 640 F. 2d 997 (CA9 1981); *Thomas* v. *S.S. Santa Mercedes*, 572 F. 2d 1331 (CA9 1978). The Courts of Appeals for the First, Second, and Fourth Circuits have adopted the interpretation followed by the Fifth Circuit. *Mavromatis* v. *United Greek Shipowners Corp.* 179 F. 2d 310 (CA1 1950); *Forster* v. *Oro Navigation Co.*, 228 F. 2d 319 (CA2 1955), aff'g 128 F. Supp. 113 (SDNY 1954); *Southern Cross S.S. Co.* v. *Firipis*, 285 F. 2d 651 (CA4 1960), cert. denied, 365 U. S. 869 (1961). We noted this conflict in *American Foreign S.S. Co.* v. *Matise*, 423 U. S. 150, 152, n. 1 (1975).

[5] Petitioner has not questioned the other holdings of the Court of Appeals in his case. Respondent did not appeal from the judgment of the District Court and has not cross-petitioned for certiorari here.

> "Every master or owner who refuses or neglects to make payment in the manner hereinbefore mentioned without sufficient cause shall pay to the seaman a sum equal to two days' pay for each and every day during which payment is delayed beyond the respective periods. . . ."

The statute in straightforward terms provides for the payment of double wages, depending upon the satisfaction of two conditions. First, the master or owner must have refused or failed to pay the seaman his wages within the periods specified. Second, this failure or refusal must be "without sufficient cause." Once these conditions are satisfied, however, the unadorned language of the statute dictates that the master or owner "*shall pay* to the seaman" the sums specified "*for each and every day* during which payment is delayed."

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[6] The statute reads in full:

"The master or owner of any vessel making coasting voyages shall pay to every seaman his wages within two days after the termination of the agreement under which he was shipped, or at the time such seaman is discharged, whichever first happens; and in case of vessels making foreign voyages, or from a port on the Atlantic to a port on the Pacific, or vice versa, within twenty-four hours after the cargo has been discharged, or within four days after the seaman has been discharged, whichever first happens; and in all cases the seaman shall be entitled to be paid at the time of his discharge on account of wages a sum equal to one-third part of the balance due him. Every master or owner who refuses or neglects to make payment in the manner hereinbefore mentioned without sufficient cause shall pay to the seaman a sum equal to two days' pay for each and every day during which payment is delayed beyond the respective periods, which sum shall be recoverable as wages in any claim made before the court; but this section shall not apply to masters or owners of any vessel the seamen of which are entitled to share in the profits of the cruise or voyage. This section shall not apply to fishing or whaling vessels or yachts."

The words chosen by Congress, given their plain meaning, leave no room for the exercise of discretion either in deciding whether to exact payment or in choosing the period of days by which the payment is to be calculated. As this Court described the statute many years ago, it "affords a definite and reasonable procedure by which the seaman may establish his right to recover double pay where his wages are unreasonably withheld." *McCrea* v. *United States*, 294 U. S. 23, 32 (1935). Our task is to give effect to the will of Congress, and where its will has been expressed in reasonably plain terms, "that language must ordinarily be regarded as conclusive." *Consumer Product Safety Comm'n* v. *GTE Sylvania, Inc.* 447 U. S. 102, 108 (1980).

The District Court found that respondent had refused to pay petitioner the balance of his earned wages promptly after discharge, and that its refusal was "without sufficient cause." Respondent challenges neither of these findings. Although the two statutory conditions were satisfied, however, the District Court obviously did not assess double wages "for each and every day" during which payment was delayed, but instead limited the assessment to the period of petitioner's unemployment. Nothing in the language of the statute vests the courts with the discretion to set such a limitation.

B

Nevertheless, respondent urges that the legislative purpose of the statute is best served by construing it to permit some choice in determining the length of the penalty period. In respondent's view, the purpose of the statute is essentially remedial and compensatory, and thus it should not be interpreted literally to produce a monetary award that is so far in excess of any equitable remedy as to be punitive.

Respondent, however, is unable to support this view of legislative purpose by reference to the terms of the statute. "There is, of course, no more persuasive evidence of the purpose of a statute than the words by which the legislature undertook to give expression to its wishes." *United States* v. *American Trucking Assns., Inc.*, 310 U. S. 534, 543 (1940). See *Caminetti* v. *United States*, 242 U. S. 470, 490 (1917). Nevertheless, in rare cases the literal application of a statute will produce a result demonstrably at odds with the intentions of its drafters, and those intentions must be controlling. We have reserved "some 'scope for adopting a restricted rather than a literal or usual meaning of its words where acceptance of that meaning . . . would thwart the obvious purpose of the statute.'" *Commissioner* v. *Brown*, 380 U. S. 563, 571 (1965) (quoting *Helvering* v. *Hammel*, 311 U. S. 504, 510–511 (1941)). This, however, is not the exceptional case.

As the Court recognized in *Collie* v. *Fergusson*, 281 U. S. 52 (1930), the "evident purpose" of the statute is "to secure prompt payment of seamen's wages . . . and thus to protect them from the harsh consequences of arbitrary and unscrupulous action of their employers, to which, as a class, they are peculiarly exposed." *Id.*, at 55. This was to be accomplished "by the imposition of liability which is not exclusively compensatory, but designed to prevent, by its coercive effect, arbitrary refusals to pay wages, and to induce prompt payment when payment is possible." *Id.*, at 55–56. Thus, although the sure purpose of the statute is remedial, Congress has chosen to secure that purpose through the use of potentially punitive sanctions designed to deter negligent or arbitrary delays in payment.

The legislative history of the statute leaves little if any doubt that this understanding is correct. The law owes its origins to the Act of July 20, 1790, ch. 29, §6, 1 Stat. 133, passed by the First Congress. Although the statute as originally enacted gave every seaman the right to collect the wages due under his contract "as soon as the voyage is ended," it did not provide for the recovery of additional sums to encourage compliance. Such a provision was added by the

Shipping Commissioners Act of 1872, ch. 322, § 35, 17 Stat. 269, which provided for the payment of "a sum not exceeding the amount of two days' pay for each of the days, not exceeding ten days, during which payment is delayed." The Act of 1872 obviously established a ceiling of 10 days on the period during which the penalty could be assessed and, by use of the words "not exceeding," left the courts with discretion to choose an appropriate penalty within that period.[7]

Congress amended the law again in 1898. As amended, it read in relevant part:

> "Every master or owner who refuses or neglects to make payment in manner hereinbefore mentioned without sufficient cause shall pay to the seaman a sum equal to one day's pay for each and every day during which payment is delayed beyond the respective periods." Act of December 21, 1898, ch. 28, § 4, 30 Stat. 756.

The amending legislation thus effected two changes: first, it removed the discretion theretofore existing by which courts might award less than an amount calculated on the basis of each day during which payment was delayed, and, second, it removed the 10-day ceiling which theretofore limited the number of days upon which an award might be calculated. The accompanying committee reports identify the purpose of the legislation as "the amelioration of the condition of the American seaman," and characterize the amended wage penalty in particular as "designed to secure the promptest possible payment of wages." H.R. Rep. No. 1657, 55th Cong., 2d Sess., 2, 3 (1898). See also S. Rep. No. 832, 54th Cong., 1st Sess., 2 (1896).[8] Nothing in the legislative history of the 1898 Act suggests that Congress intended to do anything other than what the Act's enacted language plainly demonstrates: to strengthen the deterrent effect of the statute by removing the courts' latitude in assessing the wage penalty.

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[7] The Act of 1790 and the Act of 1872 provided the basis for § 4529 of the Revised Statutes, codified in 1878. Section 4529 read as follows:

"The master or owner of every vessel making voyages from a port on the Atlantic to a port on the Pacific, or vice versa, shall pay to every seaman his wages, within two days after the termination of the agreement, or at the time such seaman is discharged, whichever first happens; and, in the case of vessels making foreign voyages, within three days after the cargo has been delivered, or within five days after the seaman's discharge, whichever first happens; and in all cases the seaman shall, at the time of his discharge, be entitled to be paid, on account, a sum equal to one-fourth part of the balance due him. Every master and owner who neglects or refuses to make payment in manner hereinbefore mentioned, without sufficient cause, shall pay to the seaman a sum not exceeding the amount of two days' pay for each of the days, not exceeding ten days, during which payment is delayed beyond the respective periods; which sum shall be recoverable as wages in any claim made before the court. But this section shall not apply to the masters or owners of any vessel the seamen on which are entitled to share in the profits of the cruise or voyage."

The statute was amended for the last time in 1915 to increase further the severity of the penalty by doubling the wages due for each day during which payment of earned wages was delayed. Seamen's Act of 1915, ch. 153, §3, 38 Stat. 1164. There is no suggestion in the committee reports or in the floor debates that in so doing, Congress intended to reinvest the courts with the discretion it had removed in the Act of 1898. Resort to the legislative history, therefore, merely confirms that Congress intended the statute to mean exactly what its plain language says.

III

Respondent argues, however, that a literal construction of the statute in this case would produce an absurd and unjust result which Congress could not have intended. The District Court found that the daily wage to be used in computing the penalty was $101.20. If the statute is applied literally, petitioner would receive twice this amount for each day after his discharge until September 17, 1980, when respondent satisfied the District Court's judgment.[9] Petitioner would receive over $300,000 simply because respondent improperly withheld $412.50 in wages. In respondent's view, Congress could not have intended seamen to receive windfalls of this nature without regard to the equities of the case.

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[8] The 1898 Act was substantially identical to legislation that had passed the House in the previous Congress, and had been favorably reported in the Senate, but had failed to come to a vote before the end of the session. Thus, the House report of the legislation enacted in 1878 contained little more than a reproduction of the House report of the previous Congress, and the relevant Senate report also dates from that Congress.

It is true that interpretations of a statute which would produce absurd results are to be avoided if alternative interpretations consistent with the legislative purpose are available. See *United States* v. *American Trucking Assns., Inc.*, 310 U. S. 534, 542–543 (1940); *Haggar* v. *Helvering*, 308 U. S. 389, 394 (1940). In refusing to nullify statutes, however hard or unexpected the particular effect, this Court has said:

> "Laws enacted with good intention, when put to the test, frequently, and to the surprise of the law maker himself,

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[9] Respondent assumes that the penalty would run until September 17, 1980, since that was the date on which it finally paid petitioner the $412.50. Brief for Respondent 17. Petitioner, on the other hand, apparently assumes that the penalty period expired on May 6, 1980, the date of the District Court's judgment. Brief for Petitioner 19. Under our construction of the statute, the district court's entry of judgment will not toll the running of the penalty period unless delays beyond that date are explained by sufficient cause. See *Pacific Mail S.S. Co.* v. *Schmidt*, 241 U. S. 245, 250–251 (1916) (holding that when an appeal is taken on reasonable grounds, the penalty should not apply to delays in payment beyond the date on which the district court's decree is entered, since those delays are supported by sufficient cause). The Court of Appeals for the Fourth Circuit, in *Southern Cross S.S. Co.* v. *Firipis*, 285 F. 2d 651, 660 (CA4 1960), cert. denied, 365 U. S. 869 (1961), and the Court of Appeals for the Third Circuit in *Swain* v. *Isthmian Lines, Inc.*, 360 F. 2d 81, 88, n. 26 (CA3 1966), have interpreted this Court's decision in *Pacific Mail* to permit the employer to toll the running of the penalty period by placing in the hands of the court the allegedly unlawfully withheld wages.

> turn out to be mischievous, absurd or otherwise objectionable. But in such case the remedy lies with the law making authority, and not with the courts." *Crooks* v. *Harrelson*, 282 U. S. 55, 60 (1930).

It is highly probable that respondents are correct in their contention that a recovery in excess of $300,000 in this case greatly exceeds any actual injury suffered by petitioner as a result of respondent's delay in paying his wages. But this Court has previously recognized that awards made under this statute were not intended to be merely compensatory:

> "We think the use of this language indicates a purpose to protect seamen from delayed payments of wages by the imposition of a liability which is not exclusively compensatory, but designed to prevent, by its coercive effect, arbitrary refusals to pay wages, and to induce prompt payment when payment is possible." *Collie* v. *Fergusson*, 281 U. S. 52, 55–56 (1930).

It is in the nature of punitive remedies to authorize awards that may be out of proportion to actual injury; such remedies typically are established to deter particular conduct, and the legislature not infrequently finds that harsh consequences must be visited upon those whose conduct it would deter. It is probably true that Congress did not precisely envision the grossness of the difference in this case between the actual wages withheld and the amount of the award required by the statute. But it might equally well be said that Congress did not precisely envision the trebled amount of some damage awards in private antitrust actions, see *Reiter* v. *Sonotone Corp.*, 442 U. S. 330, 344–345 (1979), or that, because it enacted the Endangered Species Act, "the survival of a relatively small number of three-inch fish . . . would require the permanent halting of a virtually completed dam for which Congress ha[d] expended more than $1 million," *TVA* v. *Hill*, 437 U. S. 153, 172 (1978). It is enough that Congress intended that the language it enacted would be applied as we have applied it. The remedy for any dissatisfaction with the results in particular cases lies with Congress and not with this Court. Congress may amend the statute; we may not. See *Consumer Product Safety Commission* v. *GTE Sylvania, Inc.*, 447 U. S. 102, 123–124 (1980); *Reiter* v. *Sonotone*, *supra*, at 344–345

Finally, we note that our holding is consistent with *Pacific Mail S.S. Co.* v. *Schmidt*, 241 U. S. 245 (1916). The employer in that case challenged a decision by the Court of Appeals to apply the wage penalty to the delay after the district court's judgment occasioned by the employer's appeal. The Court held that on the facts of that case, application of the penalty beyond the date of the district court's judgment was error. Contrary to respondent's assertion, however, the holding does not reflect the discretionary tailoring of the penalty to the equities of the case. Instead, the Court held that the delay pending appeal was not "without sufficient cause," as required by the statute before the penalty can attach. *Id.*, at 250.[10] As we explained earlier, a condition to the imposition of the wage penalty is a finding that the delay in payment is "without sufficient cause." To the extent that the equities of the situation are to be considered, see *Collie* v. *Fergusson*, *supra*, they bear on that finding, and not on the calculation of the penalty period once that finding has been made.

IV

The District Court found that respondent's refusal to pay petitioner earned wages following his discharge was without sufficient cause. It applied the wage penalty only for the period of nonpayment during which petitioner was unable to work. It made no finding, however, that respondent's continuing delay in payment beyond that period was for sufficient cause. Under the plain language of the statute, therefore, its decision to limit the penalty period was error. The judgment of the Court of Appeals affirming that decision accordingly is reversed and the case is remanded for proceedings consistent with this opinion.

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[10] The Court found that the employer "had strong and reasonable ground for believing that the statute ought not to be held to apply," *id.*, at 250, because the work for which the seaman claimed unpaid wages did not occur during a voyage and was the result of an oral contract.

It is so ordered.

[illegible]

[illegible]

[illegible]

SUPREME COURT OF THE UNITED STATES

No. 81-614

DANNY L. GRIFFIN, PETITIONER *v.* OCEANIC CONTRACTORS, INC.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

[June 30, 1982]

JUSTICE STEVENS, with whom JUSTICE BLACKMUN joins, dissenting.

In final analysis, any question of statutory construction requires the judge to decide how the legislature intended its enactment to apply to the case at hand. The language of the statute is usually sufficient to answer that question, but "the reports are full of cases" in which the will of the legislature is not reflected in a literal reading of the words it has chosen.[1] In my opinion this is such a case.

Qualifying language in 46 U. S. C. §596 supports a much narrower construction than the Court adopts. For over 50 years after the statute's most recent amendment in 1915, federal judges consistently construed it to avoid the absurd result the Court sanctions today. Their reading of the statute was consistent with the specific purposes achieved by the amendments in 1898 and 1915, as well as with the meaning of the statute when an award for unearned wages was first authorized.

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[1] "It is a familiar rule, that a thing may be within the letter of the statute and yet not within the statute, because not within its spirit, nor within the intention of its makers. This has been often asserted, and the reports are full of cases illustrating its application. This is not the substitution of the will of the judge for that of the legislator, for frequently words of general meaning are used in a statute, words broad enough to include an act in question, and yet a consideration of the whole legislation, or of the circumstances surrounding its enactment, or of the absurd results which follow from giving such broad meaning to the words, makes it unreasonable to believe that the legislator intended to include the particular act." *Holy Trinity Church* v. *United States*, 143 U. S. 457, 459 (1892).

I

On April 1, 1976, petitioner, a welder, suffered a temporarily disabling injury aboard respondent's vessel. On April 5, 1976, petitioner met with respondent's welding superintendent, who refused to acknowledge that respondent was responsible for the injury and who also refused to pay petitioner $412.50 in earned wages. Petitioner fully recovered from the injury by May 3, 1976, and two days later obtained comparable work with another employer. He filed this action on February 3, 1978. It is now settled that respondent was responsible for petitioner's injury and that respondent wrongfully refused to pay him $412.50 on April 5, 1976.

The question of statutory construction that is before us is what "sum shall be recoverable as wages" to compensate petitioner for respondent's refusal to pay him $412.50 on April 5, 1976. 46 U. S. C. §596.[2] The District Court computed that sum by doubling his daily wage of $101.20 and multiplying that amount by 34—the number of days between the injury on April 1 and petitioner's reemployment on May 5, 1976. The District Court's award thus amounted to $6,881.60.[3] This Court holds that the sum recoverable as wages amounts to at least $302,790.40.[4]

II

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[2] The statute is quoted in full, *ante*, at 5, n. 6.

[3] The Court of Appeals held that the award did not constitute an abuse of discretion. 664 F. 2d 36, 40 (CA5 1981).

[4] This figure is computed by reference to the period between April 1, 1976 (date of discharge) and May 6, 1980 (date of judgment). But see *ante*, at 10, n. 9.

In pertinent part, § 596 provides as follows:

> "Every master or owner who refuses or neglects to make payment [of a seaman's earned wages within four days after the seaman's discharge] without sufficient cause shall pay to the seaman a sum equal to two days' pay for each and every day during which payment is delayed beyond the [four-day period], *which sum shall be recoverable as wages* in any claim made before the court. . . ."[5]

The text of the statute admittedly supports the construction given it by the Court—if there was not sufficient cause for the refusal to make payment within four days of the discharge, then the seaman is entitled to double wages for the entire period between the fourth day and the date the payment is finally made. The statute, however, is susceptible of another interpretation. Indeed, for a half century following its latest amendment the federal courts, including this Court, consistently exercised some discretion in determining the sum recoverable as wages under this section.

A

In fixing the amount of the award of double wages, the District Court in this case may have reasoned that respondent had sufficient cause for its delay in paying the earned wages after petitioner obtained employment with another shipmaster, but that there was not sufficient cause for its failure to make payment before that time. Although this reasoning conflicts with a literal reading of § 596, it is perfectly consistent with this Court's contemporary construction of the statute in *Pacific Mail S.S. Co.* v. *Schmidt*, 241 U. S. 245 (1916).

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[5] 46 U. S. C. § 596 (emphasis added). The Court omits the italicized clause of the statute when it quotes the statute in the text of its opinion. *Ante*, at 5 and 8. The clause, it seems to me, is pertinent to our task of discerning the intent of Congress in authorizing an award of double wages. See especially *infra*, at 6.

The teaching of Justice Holmes' opinion for the Court in that case is that the wrongful character of the initial refusal to pay does not mean that all subsequent delay in payment is also "without sufficient cause" within the meaning of the statute.

The controversy in *Pacific Mail* arose in 1913, when the statute provided that the sum recoverable as wages was measured by one day's pay, rather than double that amount, for each day that the wages were withheld without sufficient cause; the statute was otherwise exactly as it is today. The seaman was discharged on October 1, 1913, but $30.33 was withheld from his wages because he was believed responsible for the loss of some silverware. He filed an action on October 20, 1913, and on November 5, 1913, obtained a judgment for his wages and an additional sum of $151.59, representing the sum recoverable as wages for the period between October 1 and November 5, 1913. The district court's decree established the proposition that the vessel owner's defenses did not constitute sufficient cause for refusing to pay the wages and requiring the seaman to sue to recover them.

The vessel owner prosecuted an unsuccessful appeal. The court of appeals not only affirmed the decision of the district court, but also added an additional recovery of daily wages for the period between the entry of the original judgment on November 5 and the actual payment of the disputed wages. The court of appeals thus read the statute literally and ordered the result that the district court's finding seemed to dictate. This Court, however, set aside the additional recovery, reaching a conclusion that cannot be reconciled with a wooden, literal reading of the statute. Concurrent findings of the district court and the court of appeals established that the refusal to make the wage payment when due was without sufficient cause. Justice Holmes and his brethren accepted that finding for purposes of decision, but reasoned that there was sufficient cause for the owner's decision to appeal and his refusal to pay while the appeal was pending.

The curious character of this Court's conclusion that reasons insufficient to justify the refusal to pay before the trial court's decision somehow became sufficient to justify a subsequent refusal to pay is not the most significant point to Justice Holmes' opinion. The case is primarily significant because its holding cannot be squared with a literal reading of the statute.[6] Even though the initial refusal is without sufficient cause, statutory wages are not necessarily recoverable for the entire period until payment is made either to the seaman or to a stakeholder.[7] A subsequent event—even though not expressly mentioned in the statute itself—may foreshorten the recovery period.

In *Pacific Mail* the subsequent event was the vessel owner's decision to appeal. The finding that that event provided sufficient cause for the delay after November 5, 1913, was made *sua sponte* by this Court. In this case the subsequent event was the reemployment of petitioner in a comparable job on May 5, 1976. The finding that that event—coupled with the failure to make any additional demand for almost two years thereafter—was sufficient cause for the delay after May 5, 1976, was made by the District Court. It is true that the judge did not expressly frame his decision in these terms, but his actual decision fits precisely the mold established by *Pacific Mail*. Both cases give a flexible reading to the "sufficient cause" language in the statute. They differ with respect to the nature of the subsequent event but not with respect to their departure from the statutory text.[8]

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[6] In a petition for rehearing, after pointing out that the Court had adopted an interpretation of the statute that had not been urged in any of the briefs or in any of the opinions of the lower courts, the seaman argued:

"According to the grammatical, natural and unambiguous meaning conveyed by the words of section 4529, R.S., Congress has limited the running of penalties only by a 'sufficient cause' for original non-payment of earned wages—a sufficient cause operating to prevent penalties from ever beginning to accrue; once these penalties begin to run, nothing short of actual payment or tender can suffice to prevent the continuous accrual of the per diem penalties." Pet. for Rehearing, O.T. 1915, No. 323, p. 5.

[7] Petitioner argues that literal application of § 596 will not yield harsh results because the shipmaster may toll the period of delay by tendering the disputed wage claim into the registry of the court. Brief for Petitioner 27. In petitioner's words, the master may make a "constructive payment of wages." *Id.*, at 28. The Court seems to accept this argument. See *ante*, at 10, n. 9. Neither petitioner nor the Court seems to recognize that acceptance of this minimal tolling rule conflicts with a literal reading of the statute. A tender of wages to the court is a "constructive payment of wages" only because a court has added that reasonable gloss to the statute.

B

The second case in which this Court construed § 596, *Collie* v. *Ferguson*, 281 U. S. 52 (1930), also focused on the meaning of the phrase "without sufficient cause." In that case the unpaid seamen claimed that the financial necessities of the owner could not constitute sufficient cause for delay in wage payments; that contention was surely consistent with the plain language of the statute. This Court nevertheless denied recovery, construing the statute as implicitly containing a requirement that the refusal be "in some sense arbitrary or wilfull, or at least a failure not attributable to impossibility of payment." *Id.*, at 55. The Court adopted this non-literal construction of the statute because it recognized the significance of the provision that a seaman's double wage claim "shall be recoverable as wages in any claim made before the court." See *id.*, at 54. In any proceeding arising out of the insolvency of the vessel owner, this provision accords this type of claim priority over general creditors and various lienors who have stronger equitable claims on limited assets. The construction of the words "without sufficient cause" to narrow the protection of the statute was consistent with the intent of Congress even though it involved a rather flexible reading of the text of the statute itself.[9]

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[8] If the Court today were to read *Pacific Mail* as requiring that the subsequent-event finding be made expressly, I would either follow Justice Holmes' lead by making a comparable finding in this Court or I would remand to the District Court for additional findings on this issue.

This Court's third occasion to interpret § 596 was *McCrea* v. *United States*, 294 U. S. 20 (1935), and, once again, the Court construed the statute narrowly, this time by taking a literal approach. In that case the seaman, citing specific sections of federal legislation, demanded from the shipmaster his discharge, his earned wages, and other benefits. The master was unfamiliar with the cited sections and asked the seaman to meet with him at noon the next day for an informed discussion of the demands. The seaman missed the appointment and left the country without contacting the master. After his return to the United States, the seaman filed an action in which he claimed entitlement to, *inter alia*, his earned wages and double wages for the delay in payment. The district court, affirmed by the court of appeals, held that the owner of the ship, the United States, was immune from the double-wage provision of § 596 because the double wages constituted a penalty. This Court granted the seaman's petition for certiorari, but avoided decision of the sovereign immunity question by holding that there was sufficient cause for the failure of the shipmaster to make the wage payment within four days of the seaman's discharge. The Court then rejected the seaman's rather reasonable argument that even if the shipmaster had cause to withhold payment during those four days, there was not sufficient cause for the continued refusal once the seaman filed his action and formally made his claim to earned wages. The Court, without citing *Pacific*

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[9] The District Court's finding of arbitrariness in this case—which, in view of the holding in *Collie*, was necessary if any penalty wage were to be recovered—must be read in the context of its actual award. It was not clearly erroneous to find that the refusal to pay petitioner $412.50 was arbitrary while he was unemployed; it surely was not equally arbitrary during the ensuing two-year period when he was employed by a competitor and did not renew his demand.

Mail, held that if the master's failure to pay earned wages at the time specified in the statute was justified by sufficient cause, the fact that he later refused to pay pursuant to a proper demand could not give rise to statutory liability even though there was no sufficient cause for the subsequent refusal.

These early interpretations of § 596 dispel any notion that the statute means exactly what it says. The Court has construed the statute "to effect its purpose," *Isbrandtsen Co.* v. *Johnson*, 343 U. S. 779, 783 (1952), and, as the early cases demonstrate, the purpose of the statute does not always require the award of double wages in the amount that the statute literally specifies.

C

Flexibility also has characterized the applications of the statute rendered by the lower federal courts. For decades those courts consistently concluded that Congress intended to allow judicial discretion to play a part in determining the amount of the double-wage recovery.[10] Whether those decisions were entirely consistent with the meaning a grammarian might have placed on the statute is less significant than the fact that they were entirely consistent with this Court's decisions and with one another,[11] and the fact that their holdings must have come to the attention of Congress.

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[10] See *Mystic S.C. Co.* v. *Stromland*, 20 F. 2d 342, 344 (CA4) ("The District Court, by limiting the right of recovery to 10 days after the libel was filed, in effect placed a limitation on the amount of the recovery under the statute. Was there objection to this? We think not."), reh'g denied, 21 F. 2d 607 (1927), cert. denied, 276 U. S. 618 (1928); *Mavromatis* v. *United Greek Shipowners Corp.*, 179 F. 2d 310, 316 (CA1 1950) ("The language of § 596 has been given a somewhat free reading so as to accord to the courts a considerable margin of discretion in adjusting the duration of the penalty to the equities of the particular case."); *Prindes* v. *S.S. African Pilgrim*, 266 F. 2d 125, 128 (CA4 1959) ("The period during which the penalty accumulates is to be determined by the equities of the particular case."); *Southern Cross Steamship Co.* v. *Firipis*, 285 F. 2d 651, 658 (CA4 1960) ("With regard to liability for double pay, a doctrine had developed before the McCrea case, and has continued to the present time, that the District Court has a measure of discretion through the application of equitable principles in determining the number of days for which double wages should be assessed."), cert. denied, 365 U. S. 869 (1961); *Caribbean Federation Lines*

It was not until 1966 that a contrary reading of the statute was adopted by the Third Circuit in *Swain* v. *Isthmian Lines, Inc.*, 360 F. 2d 81,[12] and another eight years before

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v. *Dahl*, 315 F. 2d 370, 374 (CA5) ("The time for which the penalty provision runs rests within the sound discretion of the court and depends upon the equities of the case."), cert. denied, 375 U. S. 831 (1963); *McConville* v. *Florida Towing Corp.*, 321 F. 2d 162, 168, n. 11 (CA5 1963) ("The Court has wide equitable discretion in fixing the time for which the penalty provision runs."); *The Chester*, 25 F. 2d 908, 911 (D. Md. 1928) ("[I]n spite of the seeming rigidity of the statute, there is still left to the courts certain discretionary power to limit the penalties."); *The Victoria*, 76 F. Supp. 54, 56 (SDNY 1947) ("In spite of the seeming rigidity of the statute, the court still has discretionary power to limit the penalties."), rev'd on other grounds, 172 F. 2d 434 (CA2 1949); *Forster* v. *Oro Navigation Co.*, 128 F. Supp. 113, 116 (SDNY 1954) ("The number of days for which the defendant must pay double wages rests in the discretion of the court and depends on the equities of the particular case."), aff'd, 228 F. 2d 319 (CA2 1955); *Samad* v. *The Etivebank*, 134 F. Supp. 530, 542 (ED Va. 1955) ("The number of days for which respondents must pay double wages rests in the discretion of the Court and depends upon the equities of the particular case."); *Spero* v. *Steamship The Argodon*, 150 F. Supp. 1, 6 (ED Va. 1957) ("It is well settled that the number of days for which respondents must pay double wages rests in the discretion of the Court and depends on the equities of the particular case."); *Kontos* v. *S.S. Sophie C.*, 236 F. Supp. 664, 674 (ED Pa. 1964) ("Although the penalty is applicable, its duration seems to be committed to the discretion of the trial judge to tailor to the equities of the particular case."); *Ventiadas* v. *C. J. Thibodeaux & Co.*, 295 F. Supp. 135, 138 (SD Tex. 1968) ("'The time for which the penalty provision runs rests within the sound discretion of the court and depends upon the equities of the case.'"); see also *Swanson* v. *Torry*, 25 F. 2d 835 (CA4 1928); *The Lake Galewood*, 21 F. 2d 987 (D. Md. 1927), aff'd, 25 F. 2d 1020 (CA4), cert. denied, 278 U. S. 637 (1928).

[11] See *Southern Cross Steamship Co.* v. *Firipis*, 285 F. 2d 651, 655–658 (CA4 1960), cert. denied, 365 U. S. 869 (1961).

[12] See 360 F. 2d, at 85 ("Despite this rather precise statutory directive,

that case was followed in another circuit.[13] I cannot deny that there is wisdom in the rule of construction that mandates close adherence to literal statutory text,[14] but it is also true that a consistent course of judicial construction can become as much a part of a statute as words inserted by the legislature itself. The construction consistently followed by the Federal Judiciary between 1898 and 1966 was presumably acceptable to Congress, and I find this more persuasive than the literal reading on which the Court places its entire reliance.[15] Moreover, since the result that construction produces in this case is both absurd and palpably unjust, this is one of the cases in which the exercise of judgment dictates a departure from the literal text in order to be faithful to the legislative will.[16]

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of those cases which we have uncovered, where the question—whether Section 596 of the statute may still be read with a measure of judicial discretion when supposed equitable considerations present themselves—was considered, all have found proper the balancing of the statutory language with a judicial sense of the equities of each case.").

[13] See *Escobar* v. *SS Washington Trader*, 503 F. 2d 271, 274 (CA9 1974), vacated and remanded on other grounds sub nom. *American Trading Transp. Co.* v. *Escobar*, 423 U. S. 1070 (1976).

[14] See, most recently, *Weinberger* v. *Romero-Barcelo*, —— U. S. ——, —— (STEVENS, J., dissenting).

[15] This Court based its interpretation of "sufficient cause" in *Collie* v. *Ferguson*, 281 U. S. 52 (1930), in part upon "the conclusion reached with practical unanimity by the lower federal courts." *Id.*, at 56.

[16] "The Court has had several occasions within the last few years to construe statutes in which conflicts between reasonable intention and literal meaning occurred. We have refused to nullify statutes, however hard or unexpected the particular effect, where unambiguous language called for a logical and sensible result. Any other course would be properly condemned as judicial legislation. However, to construe statutes so as to avoid results glaringly absurd, has long been a judicial function. Where, as here, the language is susceptible of a construction which preserves the usefulness of the section, the judicial duty rests upon this Court to give expression to the intendment of the law." *Armstrong Paint & Varnish Works* v. *Nu-Enamel Corp.*, 305 U. S. 315, 332–333 (1938) (footnotes

III

The construction permitting the district court to exercise some discretion in tailoring the double-wage award to the particular equities of the case is just as consistent with the legislative history of § 596 as the Court's new literal approach to this statute. In 1872, when Congress authorized the recovery of additional wages by seamen who were not paid within five days of their discharge, it used the word "shall" to make it clear that such a recovery must be awarded, but it allowed the district courts a limited discretion in setting the amount of such recovery.[17] The judge's discretion as to amount was limited in two ways: (1) the statutory wage rate could not be more than double the amount of the seaman's daily wage; and (2) the period for which the statutory wage could be awarded could not exceed 10 days.

Subsequent amendments to the statute did not remove the requirement that some recovery "shall" be awarded, but did modify both of the limits on the judge's discretion. With respect to the wage rate, Congress first specified that it should equal the daily rate—rather than double the daily rate—and later specified that the rate should be the double rate.[18]

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omitted).

[17] The 1872 version of § 596 provides in pertinent part:

"[E]very master or owner who neglects or refuses to make payment [of a seaman's earned wages within five days after the seaman's discharge] without sufficient cause shall pay to the seaman a sum not exceeding the amount of two days' pay for each of the days, not exceeding ten days, during which payment is delayed beyond the [five-day period]; and such sum shall be recoverable as wages in any claim made before the court. . . ." Act of June 7, 1872, ch. 322, § 35, 17 Stat. 269.

[18] The 1898 version of § 596 provides in pertinent part:

"Every master or owner who refuses or neglects to make payment [of a seaman's earned wages within four days of the seaman's discharge] without sufficient cause shall pay to the seaman a sum equal to one day's pay for each and every day during which payment is delayed beyond the [four-day period], which sum shall be recoverable as wages in any claim made before

With respect to the period for which the statutory wage was payable, the 1898 amendment simply removed the 10-day limit. This amendment is subject to two different interpretations, one that would represent a rather unremarkable change and the other that would be both drastic and dramatic.

The unremarkable change would amount to nothing more than a removal of the narrow 10-day limit on the scope of the judge's discretion. The word "shall" would continue to do nothing more than require some recovery in an amount to be fixed by the judge, but in recognition of the reality that seamen might be stranded for more than 10 days, the recovery period could extend beyond 10 days. This sort of unremarkable change is consistent with the purpose of the statute,[19] as well as with a legislative history that fails to make any comment on its significance. As JUSTICE REHNQUIST has perceptively observed in another context, the fact that the dog did not bark can itself be significant.[20]

The Court's construction of the amendment is, however,

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the court. . . ." Act of Dec. 21, 1898, § 4, 30 Stat. 756.

The 1915 amendment substituted "two days' pay" for "one day's pay." See Act of March 4, 1915, § 3, 38 Stat. 1164–1165.

[19] Justice Cardozo, while a member of the New York Court of Appeals, explained the purpose of the statute:

"The purpose, or at least the predominant one, was, not punishment of the master or owner, but compensation to the seaman. Delay means loss of opportunity to ship upon another vessel. It means hardship during the term of waiting, the sufferer often improvident, and stranded far from home. 'In all fairness he should recover more than the amount due him for wages earned' (*Calvin* v. *Huntley*, 178 Mass. 29, 32)." *Cox* v. *Lykes Brothers*, 237 N.Y. 376, 379, 143 N.E. 226, 227 (1924).

The District Court's award in this case, tolling the period for computing the double wages on the date petitioner obtained employment with another seagoing vessel, was also perfectly consistent with the statutory purpose.

[20] *Harrison* v. *PPG Industries, Inc.*, 446 U. S. 578, 602 (1980) (dissenting opinion); cf. A. Conan Doyle, The Silver Blaze, in The Complete Sherlock Holmes (1938).

both drastic and dramatic. Instead of effecting a modest enlargement of the judge's discretion to do justice in these cases, the Court's construction effects a complete prohibition of judicial discretion. Instead of permitting recoveries for a period somewhat longer than ten days, the amendment is construed as a command that even when the unresolved dispute persists for two or three years without any special hardship to the seaman, an automatic recovery must be ordered for the entire period regardless of the equitable considerations that may arise after the shipmaster's initial mistake has been made. Such a major change in both the potential amount of the statutory recovery and the character of the judge's authority would normally be explained in the committee reports or the debates if it had been intended.[21]

IV

It is ironic that the same seven Justices—who today are transfixed by a literal reading of § 596—only a few days ago blithely ignored the text of the Tax Injunction Act in order to reach the conclusion that a federal court has no jurisdiction to entertain a suit for a declaratory judgment against the United States Secretary of Labor to determine whether a federal statute violates the Federal Constitution. *Califor-*

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[21] The House Report's description of the 1898 amendment was that it "increases from one-fourth to one-third the amount of balance of wages due the seaman, to which he is entitled immediately upon discharge, and, in general, provides for prompter payment of wages of seamen." H.R. Rep. No. 1657, 55th Cong., 2d Sess., 3 (1898). It is noteworthy that the first change described, respecting the part of the seaman's wages to which he is entitled at the time of his discharge in every case, is rather trivial. See the full text of the statute, *ante*, at 5, n. 6. And the description of the provision for prompter payment of wages most likely refers to the amendment of the time period during which the shipmaster had to pay the seaman his full wages in order to avoid the double-wage provision of § 596. In the cases of seamen of vessels making foreign vogages, the time period was changed from five days in 1872, see n. 17 *supra*, to four days in 1898, see n. 18 *supra*.

nia v. *Grace Brethren Church*, —— U. S. —— (1982). The inconsistency in the Court's approach to the task of statutory construction in these two cases is less troublesome, however, than its failure in each case to consider whether its conclusion could reasonably be thought to represent the will of Congress. I am not persuaded that the 1898 amendment, removing the 10-day limit on the scope of the trial judge's discretion, was intended to be read as a command to award $302,790.40 to a seaman who was not paid $412.50 in wages when due.

I respectfully dissent.

READEX
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All issues available have been filmed.
Unfortunately, any scattered missing issues are no longer available.

981/81-622

(Slip Opinion)

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Lumber Co.*, 200 U. S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

SOUTHERN PACIFIC TRANSPORTATION CO. *v.* COMMERCIAL METALS CO.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 81-622. Argued March 31, 1982—Decided April 27, 1982

Respondent, as consignor, shipped goods by rail to a third party under uniform straight bills of lading prescribed by the Interstate Commerce Commission (ICC). Each bill provided that the consignor was liable for freight charges unless it signed a statement in the bill that "[t]he carrier shall not make delivery of this shipment without payment of freight and all other lawful charges." Respondent failed to execute this "nonrecourse" clause in the bills of lading. Petitioner, a common carrier by rail, delivered the first shipment to the consignee without collecting the freight charges in advance and without investigating the consignee's credit standing. Petitioner delivered the other shipments only after receiving checks from the consignee, but the checks were dishonored by the consignee's bank for insufficient funds. After unsuccessfully attempting to collect the unpaid freight charges from the consignee, petitioner requested that respondent pay the charges and, when payment was not made, filed suit against respondent in Federal District Court. The court ruled that although petitioner had established a prima facie case for the recovery of the freight charges, respondent had established a valid equitable defense by showing that petitioner had failed to comply with the ICC's credit regulations. These regulations, promulgated pursuant to § 3(2) of the Interstate Commerce Act, did not allow for delivery of freight on credit for more than five days. The Court of Appeals affirmed.

Held: Petitioner's violation of the credit regulations does not bar its collection of lawful freight charges from respondent. Pp. 6-16.

(a) Petitioner established a prima facie case of respondent's liability for the freight charges by proving that respondent failed to sign the nonrecourse clause in the bills of lading. The bill of lading is the basic trans-

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Syllabus

portation contract between the shipper-consignor and the carrier, and, unless the bill provides to the contrary, the consignor remains primarily liable for the freight charges. Thus, by failing to execute the nonrecourse provision, respondent continued to be primarily liable. Pp. 6–8.

(b) Petitioner's violation of the credit regulations did not provide respondent with an equitable affirmative defense to petitioner's prima facie case. Neither § 3(2) of the Act nor the regulations themselves intimate that a carrier's violation of the credit rules automatically precludes it from collecting the lawful freight charge. Nor does either contain any words of affirmative defense to a freight charge action. The history of the regulations further indicates that this silence was not inadvertent—the intent of the rules was to protect carriers, not to penalize them. And public policy concerns disfavor judicial implication of affirmative defenses based on carrier violations of the credit regulations. The ICC has ample authority to police the credit practices of carriers, and thereby to deter improper practices, without the judicially created remedy of forfeiture of freight charges. Pp.8–16.

641 F. 2d 235, reversed.

BLACKMUN, J., delivered the opinion for a unanimous Court.

NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D.C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

SUPREME COURT OF THE UNITED STATES

No. 81-622

SOUTHERN PACIFIC TRANSPORTATION CO., PETITIONER, *v.* COMMERCIAL METALS CO.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

[April 27, 1982]

JUSTICE BLACKMUN delivered the opinion of the Court.

This case presents the question whether a common carrier's violation of credit regulations issued by the Interstate Commerce Commission bars the carrier's collection of a lawful freight charge from a shipper-consignor who, under the terms of the shipment's bill of lading, is primarily liable for the charge.

I

Petitioner Southern Pacific Transportation Company (SP) is a common carrier by rail. Respondent Commercial Metals Company (Metals), a Delaware corporation with principal place of business in Dallas, Tex., is in the business of buying and selling steel goods. Petitioner instituted this action against respondent in the United States District Court for the Northern District of Texas to recover freight charges for three cars of steel cobble shipped by rail in 1974 from Detroit, Mich., to Alhambra, Cal.

Each of the three shipments was consigned by Metals to Penn Central Transportation Company, as initial carrier,[1] under the uniform straight bill of lading prescribed by the Interstate Commerce Commission (ICC). Each bill of lading included a "nonrecourse" clause that the consignor might sign. That clause reads: "Subject to Section 7 of Conditions, if the shipment is to be delivered to the consignee without recourse on the consignor, the consignor shall sign the following statement: The carrier shall not make delivery of this shipment without payment of freight and all other lawful charges."[2] In each instance, respondent Metals, as consignor, failed to execute this nonrecourse clause. Metals, however, already had received payment for the goods prior to shipment. Tr. of Oral Arg. 5, 6, 24–25; Brief for Respondent 21.

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[1] The shipments moved over the respective lines of the Penn Central, the St. Louis Southwestern Railway Company (an SP subsidiary), and the SP. Pursuant to an interline agreement, SP has paid the other two carriers their proportionate shares of the freight charges earned on the

The first of the three cars was tendered to Penn Central at Detroit on April 11, 1974, for transportation to Carco Steel Corporation (Carco), as consignee, in Alhambra. SP released the car to Carco on April 25 without collecting the freight charge in advance of delivery. On the same day, however, SP mailed to Carco a bill for $4,634.11, the correct amount of the charge. Carco was not a credit patron of SP and had never applied to SP for credit. SP never before had made a delivery to Carco. Nevertheless, the carrier made no investigation of Carco's credit standing.

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shipments.

[2] Section 7 of the Conditions of the Bill of Lading reads in pertinent part:

"The owner or consignee shall pay the freight and average, if any, and all other lawful charges accruing on said property; but, except in those instances where it may lawfully be authorized to do so, no carrier by railroad shall deliver or relinquish possession at destination of the property covered by this bill of lading until all tariff rates and charges thereon have been paid. *The consignor shall be liable for the freight and all other lawful charges, except that* if the consignor stipulates, by signature, in the space provided for that purpose on the face of this bill of lading that the carrier shall not make delivery without requiring payment of such charges and the carrier, contrary to such stipulation, shall make delivery without requiring such payment, the consignor (except as hereinafter provided) shall not be liable for such charges. . . . The term 'delivering carrier' means the line-haul carrier making ultimate delivery." (Emphasis added.)

The second and third shipments took place on May 2, 1974, when Metals consigned two other cars of cobble to Penn Central for transportation to Carco. SP delivered the cars to Carco on May 16. This time, SP released the cars only after receiving checks from Carco in the respective amounts of $5,761.79 and $2,383.67 for the freight charges. The larger amount was correct, but the smaller check should have been for $3,283.66 and thus was $900 short.[3] On May 20, SP issued freight bills in the correct amounts to Carco. The two checks were dishonored by Carco's bank for insufficient funds.

In August 1974, after efforts to collect the unpaid freight charges from Carco had proved fruitless, SP filed suit against Carco in a California state court. Attempts to serve the summons and complaint were unsuccessful.

On December 17, 1976, more than 30 months after the shipments, SP notified Metals of Carco's failure to pay the freight charges. SP requested that Metals, as the consignor who had failed to execute the nonrecourse provision in the bills of lading, pay the $13,679.56 total charges in satisfaction of its primary liability for the three shipments. This was the first notice to Metals that the freight charges had not been collected from Carco. When payment was not forthcoming, SP instituted the present action against Metals in federal court.

On this record, stipulated by the parties, the District Court ruled that SP had established a prima facie case for the recovery of the freight charges from Metals. It found the charges correct and in accord with applicable tariffs and that no part of those charges had been paid. App. 22. "Absent a showing of valid and affirmative defenses," then, Metals was liable to the carrier. *Id.*, at 23. The court rejected Metals' claim that the passage of time barred SP's recovery; although Metals lacked notice until December 1976 that the charges for the 1974 shipments had not been paid, the court noted that the applicable period of limitation was three years and that the carrier had been making efforts to locate Carco and to receive payment.

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[3] SP suggests that the $900 difference was occasioned by a transposition of the initial digits. Brief for Petitioner 31, n. 21. No explanation of the one-cent variance is offered.

The District Court, however, went on to hold that Metals had established a valid equitable defense to SP's collection of the charges by showing that SP had failed to comply with the ICC's credit regulations promulgated pursuant to § 3(2) of the Interstate Commerce Act, 49 U. S. C. § 3(2).[4] App. 23. See 49 CFR pt. 1320 (1981). The court was not persuaded by SP's suggestion that Metals had failed to avail itself of its contractual opportunity for exoneration afforded by the nonrecourse provision in the bills of lading. The court concluded: "The loss sustained by [SP] was due entirely to its own fault and negligence by failing to take the proper credit precautions when it delivered the goods to Carco. . . . I think that it is fundamentally unfair and inequitable for the defendant in this case to pay for the gross negligence of the plaintiff." App. 24. Accordingly, judgment was entered for Metals. *Id.*, at 26.

The United States Court of Appeals for the Fifth Circuit affirmed that judgment. 641 F. 2d 235 (1981). Like the District Court, the Court of Appeals acknowledged that in the absence of a valid defense, Metals must be held liable to SP for the freight charges. *Id.*, at 236. The court felt, however, that § 3(2) of the Act, the payment-before-delivery provision, provided a barrier to the carrier's collection of the charges from the consignor.[5] The implementing regula-

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[4] In 1978, the Interstate Commerce Act was revised and recodified by Pub. L. 95-473, 92 Stat. 1337, as 49 U. S. C. § 10101 *et seq.* (1976 ed., Supp. III). Because the transactions at issue in this case took place prior to 1978, we refer to the Act in its prior form unless otherwise specified.

[5] Section 3(2) reads:

"No carrier by railroad . . . shall deliver or relinquish possession at destination of any freight . . . shipment transported by it until all tariff rates and charges thereon have been paid, except under such rules and regulation,[6] which modified the statutory mandate by allowing for delivery of freight on credit for up to five days, nevertheless was "quite strict." *Ibid.* Thus, Metals could assert as a defense the carrier's extension of credit to Carco without adequate precautions for a period in excess of that provided by the regulation. The court concluded: "Under these circumstances, we are compelled to hold that the carrier's failure to comply with the applicable ICC regulations is a defense, available to [Metals], in an action by [SP] for unpaid freight charges." *Id.*, at 239.

Because of a conflict in the decided cases,[7] we granted certiorari. —— U. S. —— (1981).

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tions as the Commission may from time to time prescribe to govern the settlement of all such rates and charges and to prevent unjust discrimination. . . ."

[6] The applicable regulation reads in pertinent part:

"The carrier, *upon taking precautions deemed by it to be sufficient to assure payment of the tariff charges within the credit periods specified in this part*, may relinquish possession of the freight in advance of the payment of the tariff charges thereon *and may extend credit* in the amount of such charges to those who undertake to pay such charges, such persons herein being called shippers, *for a period of 4 days* (*or 5 days* where retention or possession of freight by the carrier until [tariff] rates and charges thereon have been paid will retard prompt delivery or will retard prompt release of equipment or station facilities) as set forth in this part." 49 CFR § 1320.1 (1981) (emphasis added).

[7] In agreement with the decision of the Fifth Circuit in the present case is *Brown Transp. Corp.* v. *Atcon, Inc.*, 144 Ga. App. 301, 241 S.E. 2d 15 (1977), cert. denied *sub nom. Brown Transport Corp.* v. *Atcon, Inc.*, 439 U. S. 1014 (1978) (with two Justices dissenting). The contrary result has been reached in other cases. See, *e. g.*, *Consolidated Freightways Corp.* v. *Pacheco Int'l Corp.*, 488 F. Supp. 68 (CD Cal. 1979), and *Pennsylvania R. Co.* v. *Marcelletti*, 256 Mich. 411, 240 N.W. 4 (1932).

There is disagreement, too, as to whether equitable defenses may be asserted in various other situations where regulated carriers seek to recover lawful tariff charges. Compare, *e. g.*, *Aero Mayflower Transit Co.* v. *Hofberger*, 259 Ark. 322, 532 S.W. 2d 759 (1976), and *Westover* v. *United Van Lines, Inc.*, 154 Ga. App. 865, 270 S.E. 2d 74 (1980) (defenses upheld),

II

Since 1919, the ICC has prescribed a uniform bill of lading for use on all interstate domestic shipments of freight by rail. See *In re Bills of Lading*, 52 I.C.C. 671 (1919), modified, 64 I.C.C. 357 (1921), further modified, 66 I.C.C. 63 (1922).[8] The bill of lading is the basic transportation contract between the shipper-consignor and the carrier; its terms and conditions bind the shipper and all connecting carriers. *Texas & Pacific R. Co.* v. *Leatherwood*, 250 U. S. 478, 481 (1919). "Each [term] has in effect the force of a statute, of which all affected must take notice." *Ibid.* Unless the bill provides to the contrary, the consignor remains primarily liable for the freight charges. When the ICC first promulgated the uniform bill of lading, it stated:

> "The consignor, being the one with whom the contract of transportation is made, is originally liable for the carrier's charges and unless he is specifically exempted by the provisions of the bill of lading, or unless the goods are received and transported under such circumstances as to clearly indicate an exemption for him, the carrier is enti-

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with *Bartlett-Collins Co.* v. *Surinam Nav. Co.*, 381 F. 2d 546 (CA10 1967); *American Red Ball Transit Co.* v. *McCarthy*, 114 N.H. 514, 323 A. 2d 897 (1974), cert. denied, 420 U. S. 930 (1975); *Western Maryland R. Co.* v. *Cross*, 96 W. Va. 666, 123 S.E. 572 (1924); and *Arizona Feeds* v. *Southern Pacific Transp. Co.*, 21 Ariz. App. 346, 519 P. 2d 199 (1974) (defenses not recognized).

This division prompted one commentator some years ago to refer to the "striking lack of uniformity in decisions concerning the liability of consignors and consignees despite the obvious need for uniformity in interstate commercial transactions." Note, Carriers: Federal Bills of Lading: Liability of Parties to a Prepaid Shipment, 38 Cornell L. Q. 596, 603 (1953).

[8] The form of the bill of lading has been modified several times since 1922, see, *e. g.*, *In re Bills of Lading*, 245 I.C.C. 527 (1941), but only the 1921 and 1922 modifications affected the provisions of the bill of lading relevant to this case.

> tled to look to the consignor for his charges." *In re Bills of Lading*, 52 I.C.C., at 721.

This rule has not changed over time. Recently, the ICC again observed that the consignor's liability "is governed by the bill of lading contract between the parties and must be decided by interpreting that contract." *C-G-F Grain Co.* v. *Atchison T. & S. F. R. Co.*, 351 I.C.C. 710, 712 (1976).

Clearly, then, under the contract between Metals as consignor and SP as the carrier, the consignor was primarily liable for the freight charges in question. Just as clearly, however, Metals was in a position to effectuate its release from liability by executing the nonrecourse clause in the bill of lading. Signing that clause would have operated to excuse Metals from liability. By failing to execute the nonrecourse provision, Metals continued to be primarily liable for those charges. *Illinois Steel Co.* v. *Baltimore & O. R. Co.*, 320 U. S. 508, 513 (1944); *New York, N. H. & H.R. Co.* v. *California Fruit Growers Exchange*, 125 Conn. 241, 254–255, 5 A. 2d 353, 359, cert. denied, 308 U. S. 567 (1939). See also *Louisville & Nashville R. Co.* v. *Central Iron Co.*, 265 U. S. 59, 65–67 (1924).

It is perhaps appropriate to note that a carrier has not only the right but also the duty to recover its proper charges for services performed. *Id.*, at 65–66 and n. 3. See *Pittsburgh, C., C. & St. L. R. Co.* v. *Fink*, 250 U. S. 577, 581–583 (1919). This rule of strict adherence to statutory standards is in line with the historic purpose of the Interstate Commerce Act—to achieve uniformity in freight transportation charges, and thereby to eliminate the discrimination and favoritism that had plagued the railroad industry in the late nineteenth century. *Midstate Horticultural Co.* v. *Pennsylvania R. Co.*, 320 U. S. 356, 361 (1943); *New York, N. H. & H.R. Co.* v. *ICC*, 200 U. S. 361, 391 (1906).

Both the District Court and the Court of Appeals correctly found that SP had established a prima facie case of Metals' liability for the freight charges in question by proving that

Metals had failed to sign the nonrecourse clause. This much, indeed, is conceded by Metals. Brief for Respondent 11; Tr. of Oral Arg. 31.

III

SP concedes that its failure to collect all freight charges from Carco before releasing the shipments violated the ICC regulation with regard to at least the first of the three shipments. Tr. of Oral Arg. 4, 17. See 49 CFR § 1320.1, quoted in n. 6, *supra*. The question, then, is whether the Court of Appeals properly found that SP's violation of the regulation provided Metals with an equitable affirmative defense to SP's prima facie case.[9]

A. The ICC has comprehensively regulated the extension of credit to shippers by rail carriers. See 49 CFR pt. 1320 (1981). Yet neither the statute under which the regulations were promulgated, 49 U. S. C. § 3(2), nor the regulations themselves intimate that a carrier's violation of the credit rules automatically precludes it from collecting the lawful freight charge. Nor does either contain any words of affirmative defense to a freight charge action. Indeed, to the extent the ICC has spoken to this question, it has stated: "[A] violation of section 3(2) by [a carrier], in itself, would have had no effect on [a consignor's] responsibility for payment of undercharges." *C–G–F Grain Co.* v. *Atchison, T. & S. F. R. Co.*, 351 I.C.C., at 712. Although § 3(2) "prohibits a rail carrier from delivering freight without collecting all charges thereon, . . . it contains no provision shielding a consignor from liability for lawful charges." *Ibid.* Thus, at least in dictum, the ICC has suggested that "[t]he question of [a consignor's] liability [under a bill of lading] does not turn on whether any provision of the act has been violated." *Ibid.*

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[9] Metals now asserts, as well, that SP's actions violated § 7 of the Conditions of the bill of lading, see n. 2, *supra*, and thus constituted a complete abrogation of SP's contractual obligations under the bill of lading. See Brief for Respondent 11. SP answers that this argument was presented to neither the District Court nor the Court of Appeals. See Reply Brief for Petitioner 4. Because the Court of Appeals did not rely on this theory to grant respondent relief, and because we did not grant certiorari to consider this breach-of-contract claim, we decline to address it.

We view the absence of any provision for an affirmative defense in the ICC's credit regulations as an administrative construction of the statute that aids our determination of congressional intent. "[L]egislative silence is not always the result of a lack of prescience; it may instead betoken permission or, perhaps, considered abstention from regulation. . . . Accordingly, caution must temper judicial creativity in the face of legislative or regulatory silence." *Ford Motor Credit Co.* v. *Milhollin*, 444 U. S. 555, 565 (1980). We so regard the administrative silence here. When an administrative agency historically has engaged in comprehensive regulation of an industry's credit practices, the agency's silence regarding an affirmative defense based on a violation of those regulations must be deemed significant.

B. The legislative and administrative history of the credit regulations further indicates that this silence was not inadvertent—the intent of the rules was to protect carriers, not to penalize them. Prior to 1918, the Federal Government did not regulate the extension of credit by rail carriers. Wartime regulation revealed, however, that a general requirement of payment before delivery would protect the working capital of carriers and avoid discrimination among credit recipients. Cf. *Ex Parte No. MC-1*, 2 M.C.C. 365, 374 (1937). After the first World War, when Congress returned the railroads to private control, § 405 of the Transportation Act, 1920, 41 Stat. 479, added paragraph (2) to § 3 of the Interstate Commerce Act. See n. 5, *supra*. The regulations adopted by the ICC in 1920 under the statute as so amended permitted railroads to extend limited credit to shippers on a nondiscriminatory basis. The regulations have remained largely unchanged to the present time. Until 1971, no court seriously suggested that a violation of the credit regulations precluded a carrier from collecting a freight charge from the party with primary liability. Instead, a defense of estoppel based on a violation of the credit regulations was held to be inconsistent with the purpose of the regulations themselves. Courts were concerned that a rule permitting selective estoppels would defeat the antidiscriminatory purpose of the Act and would weaken the capital structure of common carriers. See, *e. g.*, *Western Maryland R. Co.* v. *Cross*, 96 W.Va. 666, 673, 123 S.E. 572, 575 (1924); *Chicago Junction R. Co.* v. *Duluth Log Co.*, 161 Minn. 466, 469, 202 N.W. 24, 25 (1925); *East Texas Motor Freight Lines* v. *Franklin County Distilling Co.*, 184 S.W. 2d 505, 507 (Tex. Civ. App. 1944).

Despite the absence of any textual or historical support for an affirmative defense in either the statute or the regulations, the Court of Appeals concluded that Metals could raise SP's failure to comply fully with the regulations as an absolute equitable defense to SP's freight charge action. The Court of Appeals relied primarily on what it regarded as "a closely analogous situation," 641 F. 2d, at 237, presented in *Consolidated Freightways Corp.* v. *Admiral Corp.*, 442 F. 2d 56 (CA7 1971). On examination, however, that Seventh Circuit case plainly is distinguishable from the present one. The defendant there was a *consignee* to whom goods had been delivered under bills of lading marked "prepaid." Relying upon the carrier's explicit representation of prepayment, the consignee paid the amount of the freight charges to the shipper-consignor. In fact, however, the carrier had extended credit to the consignor and had failed to collect the charges within the period allowed by the regulations. When the consignor went out of business, the carrier turned to the consignee for payment. The Court of Appeals, by a divided vote, held the carrier estopped.

Admiral differs from this case in four crucial respects. First, in *Admiral*, the carrier not only violated ICC credit regulations but also made to the defendant a material misrepresentation regarding prepayment. The carrier here, in contrast, was charged solely with failure to observe the applicable ICC credit regulations. Second, in the Seventh Circuit case, the consignee-defendant had paid full freight charges to the consignor. Had the Seventh Circuit also awarded relief to the carrier, it would have "require[d] an innocent consignee to defray freight charges exactly double the amount contemplated by the applicable tariffs." 442 F. 2d, at 65 (STEVENS, J., concurring). Here, the defendant paid no freight charges; thus, an award of relief to the carrier creates no possibility of enforcing a double payment.

Third, in *Admiral*, the grounds for equitable estoppel were created by the consignee's payment of freight charges in detrimental reliance on the carrier's misrepresentation. The carrier's violation of the credit regulations offered only "additional grounds for the intervention of the principles of equity." *Id.*, at 60 (majority opinion). In this case, there is no suggestion that the consignor knew of, or changed its position detrimentally in reliance on, the carrier's credit violation. Fourth, and most significant, the defendant-consignee in the Seventh Circuit case had no means by which to protect itself from freight charge liability. In this case, of course, the defendant-consignor could have protected itself completely simply by signing the nonrecourse clause in the bills of lading.

C. Finally, public policy concerns disfavor judicial implication of affirmative defenses based on carrier violations of the Commission's credit regulations. We recognize that the regulations are technical. Thousands of rail cars are delivered every day by the country's railroads. See Association of American Railroads, Yearbook of Railroad Facts 25 (1981) (approximately 62,000 deliveries per day). Almost inevitably, some cars will be delivered to noncredit patrons, some freight bills will be sent out late, and some accounts will not be collected within the specified time. A 1966 study by the ICC's Bureau of Enforcement found that almost a third of

15,751 bills examined were overdue and that over half of those overdue were delinquent more than 10 days. See *In re Regulations for Payment of Rates and Charges*, 326 I.C.C. 483, 485 (1966).[10] After appraising this data, the ICC agreed "that the evidence establishes many and continued violations of the credit regulations. However, we are unable to conclude on this record that rigid rules . . . would provide a practical or desirable solution. . . . [T]here are many reasons for credit violations which are beyond correction by rules, *e. g.*, where shippers have unexpected peak workloads, where there are controversies over amounts due, where additional information is needed such as weights or evaluations, where standard office procedures are in the process of change, where temporary cash flow problems occur, and where it becomes necessary to check the validity of charges with third persons. Stringent credit rules . . . would destroy the flexibility needed to meet problems of this nature." *Id.*, at 489–490. Indeed, in 1980, the ICC proposed repealing the credit regulations altogether, noting that "apparent, widespread noncompliance with the regulations indicates that the payment periods and other time limits prescribed are simply not realistic for many of the situations in which they apply." *Ex parte Nos. MC–1, 73, 143, and 170*, 45 Fed. Reg. 31766.

It thus appears that the Court of Appeals in the present case implied an affirmative defense that would penalize railroads for violations of the credit regulations just as the agency responsible for administering those regulations was pronouncing them unrealistic. The prospect raised for the carrier is that it will be barred from recovering lawful freight charges, even from a consignor who fails to execute the nonrecourse clause, for possibly unavoidable violations of the credit rules. "The obvious consequence would be to discourage [carriers] from extending credit where the operation of this rather difficult statute is in doubt." *Bruce's Juices, Inc.* v. *American Can Co.*, 330 U. S. 743, 753 (1947). Ironically, those shippers who pay their bills currently in a responsible manner would suffer as a result.

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[10] The methodology of this study was questioned by the railroads. The roads' own figures, however, showed that of 445,984 collectible items accrued during the period of the investigation, more than 10,000 resulted in credit violations. 326 I.C.C., at 486.

Metals argues that a ruling for SP places SP "in the unrealistic position of being incapable of doing any wrong" and therefore creates "no incentive [for carriers] to improve inefficient and careless credit practices." Brief for Respondent 12. Metals further claims that the loss at issue here would not have occurred if SP only had complied with its obligations under the regulations. *Id.*, at 24. The answer to this is that the ICC has ample authority to police the credit practices of carriers and thereby to deter improper practices. This authority includes the power to issue a cease and desist order, see *Shaw Warehouse Co.* v. *Southern R. Co.*, 308 I.C.C. 609, 633–634, 637 (1959), appeal dism'd *sub nom. Southern R. Co.* v. *United States*, 186 F. Supp. 29 (ND Ala. 1960); the power to seek a federal court injunction requiring a carrier to comply with the regulations, see *ICC* v. *All-American, Inc.*, 505 F. 2d 1360 (CA7 1974); and the power to bring suit for the $5000 civil forfeiture, provided by 49 U. S. C. § 16(8) (1976) and 49 U. S. C. § 11901(a) (1976 ed., Supp. III), for each knowing violation of an order of the Commission, see, *e. g.*, *United States* v. *Western Pacific R. Co.*, 385 F. 2d 161 (CA10 1967), cert. denied *sub nom. Denver & R.G.W. R. Co.* v. *United States*, 391 U. S. 919 (1968); *United States* v. *Pennsylvania R. Co.*, 308 F. Supp. 293 (ED Pa. 1969).

Thus, the ICC may regulate the credit practices of carriers even without the judicially-created remedy of forfeiture of freight charges. Furthermore, a reading of the cited cases reveals that the question whether a credit violation has occurred often will require the ICC or the courts to conduct a factual inquiry as to the carrier's intent to violate the regulations. The "credit violation defense" adopted by the Court of Appeals requires a carrier to forfeit freight charges without regard to the nature of its violation.[11] This inflexible approach disenables courts from considering the carrier's intent, the degree of the shipper's fault, the effect of enforcement on the carrier's existing permissible credit practices, and other subjective factors in deciding whether or not to enforce a shipper's primary liability for freight charges.

Metals also advances a number of "double payment" cases in support of its claim for an affirmative defense. See, *e. g.*, *Southern Pacific Transp. Co.* v. *Campbell Soup Co.*, 455 F. 2d 1219 (CA8 1972); *Consolidated Freightways Corp.* v. *Ad-*

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[11] The facts of this case illustrate the problems that may arise when a court ventures to create law in this highly technical field. The rulings of the District Court and the Court of Appeals denied SP recovery not only for the first car, which was delivered without any payment upon the freight charge, but also for the two cars for which it did demand payment before delivery and received checks for the charges.

Yet acceptance of a proper check as payment for a freight charge is an acknowledged commercial practice in the railroad industry. See *Fullerton Lumber Co.* v. *Chicago, M., St. P. & P. R. Co.*, 282 U. S. 520, 522 (1931); see also 49 CFR § 1320.13 (1981). It therefore is at least possible that SP's insistence on payment by check before releasing the second and third cars constituted compliance with the regulations, which require only that the railroad take "precautions deemed by it to be sufficient to assure payment of the tariff charges." 49 CFR § 1320.1 (1981). It is true, of course, that the check for one car was understated by $900, but, as has been noted, SP mailed a freight bill for the correct amount to Carco within four days of the delivery. See 49 CFR § 1320.5 (1981) (carrier may extend credit for up to 30 days on balance due in the event of undercharges).

Furthermore, it is by no means clear that SP could safely have deferred delivery of the second and third cars until after Carco had paid the charges on the first car. The carrier's lien for unpaid charges covers only the goods in the immediate shipment. 49 U. S. C. § 105. See *Atlas S. S. Co.* v. *Colombian Land Co.*, 102 F. 358, 361 (CA2 1900). Once Carco offered to pay the charges on the second and third cars, even serious suspicion about Carco's financial health might not have allowed SP to withhold delivery without risking liability to Carco for conversion of its goods. See 49 U. S. C. § 88 (carrier's duty to deliver goods on demand).

miral Corp., 442 F. 2d 56 (CA7 1971); *Farrell Lines, Inc.* v. *Titan Industrial Corp.*, 306 F. Supp. 1348 (SDNY), aff'd, 419 F. 2d 835 (CA2 1969), cert. denied, 397 U. S. 1042 (1970); *Southern Pacific Co.* v. *Valley Frosted Foods Co.*, 178 Pa. Super. 217, 116 A. 2d 70 (1955). To be sure, these cases speak in equity terms. But none of these cases turned solely on a carrier's violation of credit regulations. Each and all of them involved a carrier's misrepresentation, such as a false assertion of prepayment on the bill of lading, upon which a consignee detrimentally relied only to find itself later sued by the carrier for the same freight charges. We find that these double payment cases constitute their own category and stand against the placement of duplication of liability upon an innocent party. See *Consolidated Freightways Corp.* v. *Admiral Corp.*, 442 F. 2d, at 65 (STEVENS, J., concurring).

As we have noted above, no similar double payment liability is in prospect here. Metals, not the carrier, selected the consignee. Furthermore, Metals has been paid for its goods while the carrier has not been paid for its services. The carrier unsuccessfully has pursued its remedies against the consignee before turning to the shipper-consignor for payment. Nor had the statute of limitation run when SP finally sued Metals for payment.

We, of course, are in no position to condone slipshod collection practices and a carrier's violation of the governing regulations. But the terms of the bill of lading are specific and clear. Metals' failure to execute the nonrecourse provision in the bill of lading specifically placed upon it primary liability for the freight charges. To permit SP's violation of the credit regulations to be raised as an affirmative defense to its prima facie case would serve to nullify the enforceability of the nonrecourse clause. Nor do we believe that judicial implication of such a defense is necessary to encourage carrier compliance with credit rules. Railroads have real economic incentives to collect their freight charges from consignees insofar as they are able. The remedies for a carrier's violations of the regulations are best left to the ICC for such resolution as it thinks proper.

We therefore hold that the Court of Appeals erred by permitting Metals to assert an affirmative defense against SP based on its violation of the ICC credit regulations. Such "equities" as may exist by virtue of the carrier's delay and its violation of the credit regulations are insufficient in magnitude to overcome the time-honored rule that under such circumstances, no "act or omission of the carrier (except the running of the statute of limitations) [will] estop or preclude it from enforcing payment of the full amount by a person liable therefor." *Louisville & Nashville R. Co.* v. *Central Iron Co.*, 265 U. S. 59, 65 (1924).

The judgment of the Court of Appeals is reversed.

It is so ordered.

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NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Lumber Co.*, 200 U. S. 321, 337.

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SUPREME COURT OF THE UNITED STATES

Syllabus

FIDELITY FEDERAL SAVINGS & LOAN ASSOCIATION v. DE LA CUESTA

APPEAL FROM THE COURT OF APPEAL OF CALIFORNIA, FOURTH APPELLATE DISTRICT

No. 81-750. Argued April 28, 1982—Decided June 28, 1982

Section 5(a) of the Home Owners' Loan Act of 1933 (HOLA) empowers the Federal Home Loan Bank Board (Board), under such regulations as it may prescribe, to provide for the organization, operation, and regulation of federal savings and loan associations. Pursuant to this authorization, the Board issued a regulation providing that a federal savings and loan association "continues to have the power to include . . . in its loan instrument" a "due-on-sale" clause, *i. e.*, a provision that permits the association to declare the entire balance of the loan immediately due and payable if the property securing the loan is sold or otherwise transferred without the association's prior written consent. A preamble to the regulation stated that the due-on-sale practices of federal savings and loan associations shall be governed "exclusively by Federal law" and that the association "shall not be bound by or subject to any conflicting State law which imposes different . . . due-on-sale requirements." Appellees each purchased California real property from one who had borrowed money from appellant Fidelity Savings and Loan Association (Fidelity). The borrowers had given Fidelity deeds of trust on the property; each deed contained a due-on-sale clause. Fidelity, not having received prior notice of the purchases, proceeded to enforce the due-on-sale clauses to accelerate payment of the loans, and when they were not paid, instituted nonjudicial foreclosure proceedings. Each appellee then filed suit against Fidelity in California Superior Court, asserting that Fidelity's exercise of the due-on-sale clauses violated the principles announced in *Wellenkamp* v. *Bank of America*, 21 Cal. 3d 943, 582 P. 2d 970, which limited a lender's right to exercise such a clause to cases where the lender can demonstrate that the transfer of the property has impaired its security. The Superior Court consolidated the actions and granted Fi-

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delity's motion for summary judgment on the ground that the Federal Government had totally occupied the regulation of federal savings and loan associations. The California Court of Appeal reversed, holding that *Wellenkamp* was controlling and that federal law had not expressly or impliedly pre-empted state due-on-sale law.

Held: The Board's due-on-sale regulation pre-empts conflicting state limitations on the due-on-sale practices of federal savings and loan associations, and thus bars application of the *Wellenkamp* rule to such associations. Pp. 9-28.

(a) The general principles governing pre-emption of state law that conflicts with federal law are not inapplicable here simply because real property is a matter of special concern to the States. And federal regulations have no less pre-emptive effect than federal statutes. Where Congress has empowered an administrator to promulgate regulations, regulations intended to pre-empt state law have that effect unless the administrator exceeded his statutory authority or acted arbitrarily. Pp. 9-11.

(b) The language of the Board's regulation and especially the preamble thereto clearly show the Board's intent to pre-empt the *Wellenkamp* doctrine. The conflict between that doctrine and the regulation does not evaporate because the regulation simply permits, but does not compel, federal savings and loan associations to include a due-on-sale clause in their contracts and to enforce that clause when the security property is transferred. While compliance with both the regulation and the *Wellenkamp* rule may not be a physical impossibility, that rule forbids a federal savings and loan association to enforce a due-on-sale clause at its option and deprives the association of the flexibility given it by the Board. The rule therefore creates an obstacle to the accomplishment of the regulation's purpose. Pp. 11-16.

(c) The Board acted within its statutory authority in issuing the preemptive due-on-sale regulation. Both the language and legislative history of the HOLA indicate that the Board was authorized to regulate the lending practices of federal savings and loan associations. Congress delegated power to the Board expressly for the purpose of creating and regulating these associations so as to ensure that they would remain financially sound and able to supply financing for home construction and purchase. Consistent with that purpose, the Board reasonably exercised its authority in promulgating the due-on-sale regulation. Pp. 16-27.

121 Cal. App. 3d 328, 175 Cal. Rptr. 467, reversed.

BLACKMUN, J., delivered the opinion of the Court, in which BURGER, C. J., and BRENNAN, WHITE, MARSHALL, and O'CONNOR, JJ., joined.

Syllabus

O'CONNOR, J., filed a concurring opinion. REHNQUIST, J., filed a dissenting opinion, in which STEVENS, J., joined. POWELL, J., took no part in the consideration or decision of this case.

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[illegible], J., delivered the opinion of the Court, in which [illegible], J., and BRENNAN, WHITE, MARSHALL, and O'CONNOR, JJ., joined.

NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D.C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

SUPREME COURT OF THE UNITED STATES

No. 81-750

FIDELITY FEDERAL SAVINGS AND LOAN ASSOCIATION, ET AL., APPELLANTS *v.* REGINALD D. DE LA CUESTA ET AL.

ON APPEAL FROM THE COURT OF APPEAL OF CALIFORNIA, FOURTH APPELLATE DISTRICT

[June 28, 1982]

JUSTICE BLACKMUN delivered the opinion of the Court.

At issue in this case is the pre-emptive effect of a regulation, issued by the Federal Home Loan Bank Board (Board), permitting federal savings and loan associations to use "due-on-sale" clauses in their mortgage contracts. Appellees dispute both the Board's intent and its statutory authority to displace restrictions imposed by the California Supreme Court on the exercise of these clauses.

I

A

The Federal Home Loan Bank Board, an independent federal regulatory agency, was formed in 1932 and thereafter was vested with plenary authority to administer the Home Owners' Loan Act of 1933 (HOLA), 48 Stat. 128, as amended, 12 U. S. C. § 1461 *et seq.* (1976 ed. and Supp. IV).[1] Section

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[1] The Board came into being under § 17 of the earlier Federal Home Loan Bank Act, 47 Stat. 736, as amended, 12 U. S. C. § 1437, the statute which created the federal home loan bank system. The three members of the Board are appointed by the President, with the advice and consent of the Senate, for four-year terms. See note following 12 U. S. C. § 1437. In addition to providing for the establishment of federal savings and loan associations, the HOLA, by its § 3, 48 Stat. 129, repealed § 4(d) of the Fed-

5(a) of the HOLA, 12 U. S. C. § 1464(a) (1976 ed., Supp. IV), empowers the Board, "under such rules and regulations as it may prescribe, to provide for the organization, incorporation, examination, operation, and regulation of associations to be known as 'Federal Savings and Loan Associations.'" Pursuant to this authorization, the Board has promulgated regulations governing "the powers and operations of every Federal savings and loan association from its cradle to its corporate grave." *People* v. *Coast Federal Sav. & Loan Assn.*, 98 F. Supp. 311, 316 (SD Cal. 1951).

In 1976, the Board became concerned about the increasing controversy as to the authority of a federal savings and loan association to exercise a "due-on-sale" clause—a contractual provision that permits the lender to declare the entire balance of a loan immediately due and payable if the property securing the loan is sold or otherwise transferred.[2] Specifi-

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eral Home Loan Bank Act, 47 Stat. 727, which had authorized federal home loan banks to make loans directly to homeowners. The HOLA, by its § 4, 48 Stat. 129, instructed the Board to create the Home Owners' Loan Corporation; this agency was to exchange its bonds for mortgages held by financial institutions, including state-chartered savings and loans, and to provide funds to needy homeowners for accrued taxes, maintenance, and repairs.

[2] The due-on-sale clause used in many loan instruments is ¶ 17 of the uniform mortgage instrument developed by the Federal Home Loan Mortgage Corporation and the Federal National Mortgage Association. Paragraph 17 appears in two of the deeds of trust at issue in this case and reads:

"17. Transfer of the Property; Assumption. If all or any part of the Property or an interest therein is sold or transferred by Borrower without Lender's prior written consent, excluding (a) the creation of a lien or encumbrance subordinate to this Deed of Trust, (b) the creation of a purchase money security interest for household appliances, (c) a transfer by devise, descent or by operation of law upon the death of a joint tenant or (d) the grant of any leasehold interest of three years or less not containing an option to purchase, *Lender may, at Lender's option, declare all the sums secured by this Deed of Trust to be immediately due and payable.* Lender shall have waived such option to accelerate if, prior to the sale or transfer, Lender and the person to whom the Property is to be sold or transferred cally, the Board felt that restrictions on a savings and loan's ability to accelerate a loan upon transfer of the security would have a number of adverse effects: (1) that "the financial security and stability of Federal associations would be endangered if . . . the security property is transferred to a person whose ability to repay the loan and properly maintain the property is inadequate"; (2) that "elimination of the due on sale clause will cause a substantial reduction of the cash flow and net income of Federal associations, and that to offset such losses it is likely that the associations will be forced to charge higher interest rates and loan charges on home loans generally"; and (3) that "elimination of the due on sale clause will restrict and impair the ability of Federal associations to sell their home loans in the secondary mortgage market, by making such loans unsalable or causing them to be sold at reduced prices, thereby reducing the flow of new funds for residential loans, which otherwise would be available." 41 Fed. Reg. 6283, 6285 (1976). The Board concluded that "elimination of the due-on-sale clause will benefit only a limited number of home sellers, but generally will cause economic hardship to the majority of home buyers and potential home buyers." *Ibid.*

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reach agreement in writing that the credit of such person is satisfactory to Lender and that the interest payable on the sums secured by this Deed of Trust shall be at such rate as Lender shall request. If Lender has waived the option to accelerate provided in this paragraph 17 and if Borrower's successor in interest has executed a written assumption agreement accepted in writing by Lender, Lender shall release Borrower from all obligations under this Deed of Trust and the Note.

"If Lender exercises such option to accelerate, Lender shall mail Borrower notice of acceleration in accordance with paragraph 14 hereof. Such notice shall provide a period of not less than 30 days from the date the notice is mailed within which Borrower may pay the sums declared due. If Borrower fails to pay such sums prior to the expiration of such period, Lender may, without further notice or demand on Borrower, invoke any remedies permitted by paragraph 18 hereof." App. 50–51, 85–86 (emphasis added).

Accordingly, the Board issued a regulation, effective July 31, 1976, governing due-on-sale clauses. The regulation, now 12 CFR § 545.8–3(f) (1982),[3] provides in relevant part:

> "[A federal savings and loan] association continues to have the power to include, as a matter of contract between it and the borrower, a provision in its loan instrument whereby the association may, at its option, declare immediately due and payable sums secured by the association's security instrument if all or any part of the real property securing the loan is sold or transferred by the borrower without the association's prior written consent. Except as [otherwise] provided in . . . this section . . . , exercise by the association of such option (hereafter called a due-on-sale clause) shall be exclusively governed by the terms of the loan contract, and all rights and remedies of the association and borrower shall be fixed and governed by that contract."

In the preamble accompanying final publication of the due-on-sale regulation, the Board explained its intent that the due-on-sale practices of federal savings and loans be governed "exclusively by Federal law." 41 Fed. Reg. 18286, 18287 (1976). The Board emphasized that "[f]ederal associations shall not be bound by or subject to any conflicting State law which imposes different . . . due-on-sale requirements." *Ibid.*[4]

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[3] The due-on-sale regulation was codified initially in 12 CFR § 545.6–11(f). See 44 Fed. Reg. 39108, 39149 (1979).

[4] Even before adopting the due-on-sale regulation, the Board had interpreted 12 CFR § 545.8–3(a)—a regulation promulgated in 1948 that requires all loan instruments to "provide for full protection to the Federal association"—as authorizing federal savings and loans to exercise due-on-sale provisions, despite any state law to the contrary, because such clauses help ensure "full protection" to the lender. See the Board's Advisory Opinion, Resolution No. 75–647, in *Schott* v. *Mission Federal Sav. & Loan Assn.* (*Schott* Advisory Opinion), No. Civ–75–366, at 13–15 (CD Cal. July

B

Appellant Fidelity Federal Savings and Loan Association (Fidelity) is a private mutual savings and loan association chartered by the Board pursuant to § 5(a) of the HOLA. Fidelity's principal place of business is in Glendale, Cal. Appellees, de la Cuesta, Moore, and Whitcombe, each made a purchase of California real property from one who had borrowed money from Fidelity. As security for the loan, the borrower had given Fidelity a deed of trust on the property. Each deed of trust contained a due-on-sale clause. Two of the deeds also included a provision, identified as ¶ 15, which stated that the deed "shall be governed by the law of the jurisdiction in which the Property is located." App. 51, 86.[5]

Fidelity was not notified prior to each appellee's purchase of property; when it did learn of the transfer, it gave notice of its intent to enforce the due-on-sale clause. Fidelity expressed a willingness to consent to the transfer, however, if the appellee agreed to increase the interest rate on the loan secured by the property to the then-prevailing market rate.

30, 1975), reprinted as Exhibit A to Defendants' Memorandum of Points and Authorities in Opposition to Plaintiffs' Motion for Preliminary Injunction.

[5] Paragraph 15 is also part of the uniform mortgage instrument developed by the Federal Home Loan Mortgage Corporation and the Federal National Mortgage Association. See n. 2, *supra*. The paragraph reads in full:

"15. Uniform Deed of Trust; Governing Law; Severability. This form of deed of trust combines uniform covenants for national use and non-uniform covenants with limited variations by jurisdiction to constitute a uniform security instrument covering real property. This Deed of Trust shall be governed by the law of the jurisdiction in which the Property is located. In the event that any provision or clause of this Deed of Trust or the Note conflicts with applicable law, such conflicts shall not affect other provisions of this Deed of Trust or the Note which can be given effect without the conflicting provision, and to this end the provisions of the Deed of Trust and the Note are declared to be severable." App. 51–52, 86–87.

Each appellee refused to accept this condition; Fidelity then exercised its option to accelerate the loan. When the loan was not paid, Fidelity instituted a nonjudicial foreclosure proceeding.

In response, each appellee filed suit in the Superior Court of California for Orange County. Each asserted that, under the principles announced by the California Supreme Court in *Wellenkamp* v. *Bank of America*, 21 Cal. 3d 943, 582 P. 2d 970 (1978), Fidelity's exercise of the due-on-sale clause violated California's prohibition of unreasonable restraints on alienation, Cal. Civ. Code Ann. § 711 (West) (1954), "unless the lender can demonstrate that enforcement is reasonably necessary to protect against impairment to its security or the risk of default." 21 Cal. 3d, at 953, 582 P. 2d, at 977. Each complaint sought (1) a judicial declaration that the due-on-sale clause was not enforceable unless Fidelity first showed that the transfer had harmed its security interest, (2) an injunction against any foreclosure procedures based on the clause, and (3) compensatory and punitive damages. App. 5, 49, 84.[6]

The Superior Court consolidated the three actions and granted appellants' motion for summary judgment. The court explained that "the federal government has totally occupied the subject of regulation of Federal Savings and Loans," and held, therefore, that the decision in *Wellenkamp* "cannot be extended to [federal] savings and loans." App. to Juris. Statement 29a.

The Court of Appeal for the Fourth Appellate District, however, reversed that judgment. In an opinion that adopted substantial portions of a parallel ruling by the Court of Appeal for the First Appellate District, it concluded that the California Supreme Court's opinion in *Wellenkamp* was controlling. 121 Cal. App. 3d 328, 175 Cal. Rptr. 467 (1981), quoting *Panko* v. *Pan American Federal Sav. & Loan Assn.*, 119 Cal. App. 3d 916, 174 Cal. Rptr. 240 (1981), cert. pending, No. 81–922. The court found that Congress had neither expressed an intent to pre-empt state due-on-sale law nor fully occupied the field of federal savings and loan regulation; for example, the court pointed out, federal associations traditionally have been governed by state real property and mortgage law with respect to title, conveyancing, recording, priority of liens, and foreclosure proceedings.

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[6] Each complaint also included a slander count, alleging that Fidelity had maliciously published false charges that the appellee was in default under the deed of trust. App. 9, 54, 89.

The Court of Appeal likewise rejected appellants' contention that the Board's 1976 regulation expressly had pre-empted the *Wellenkamp* doctrine. Although the court recognized that the preamble accompanying 12 CFR § 545.8–3(f) manifested the Board's intent that its due-on-sale regulation supersede conflicting state law, it refused to "equate the *Board's* expression of intent with the requisite *congressional* intent." 121 Cal. App. 3d, at 339, 175 Cal. Rptr., at 474 (emphasis in original).[7]

Finally, the Court of Appeal found no evidence that federal law impliedly had pre-empted state law, reasoning that California's due-on-sale law was not incompatible with federal law. The *Wellenkamp* doctrine, the court observed, "is a substantive rule of California property and mortgage law," and not a form of "regulation" over federal savings and loans. 121 Cal. App. 3d, at 341, 175 Cal. Rptr., at 474. Moreover, the court noted, the Board's regulation "merely authorizes and does not compel savings and loan associations to include a due-on-sale clause in their loan contracts and to exercise their rights thereunder." *Ibid.*, 175 Cal. Rptr., at 475. The Court of Appeal likewise discovered no conflict between the *Wellenkamp* doctrine and the purposes of the HOLA because both were designed to assist financially distressed homeowners.

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[7] In addition, the Court of Appeal noted that two of the three deeds of trust at issue were executed prior to the effective date of § 545.8–3(f). Therefore, the court reasoned, the Board's due-on-sale regulation was not applicable to those loan instruments and could not pre-empt state law with respect to those deeds. See 121 Cal. App. 3d, at 344, 345, 175 Cal. Rptr., at 476–477, 477.

The court derived "further support," 121 Cal. App. 3d, at 342, 175 Cal. Rptr., at 475, for its decision from ¶ 15, which was included in two of the deeds of trust and which provided that the deeds would be "governed by the law of the jurisdiction in which the Property is located." See n. 5, *supra.* That language, the court ruled, evinced an unmistakable intent that state law should govern the interpretation, validity, and enforcement of the deeds.[8]

The California Supreme Court denied appellants' petition for review. App. to Juris. Statement 28a.

Because the majority of courts to consider the question have concluded, in contrast to the decision of the Court of Appeal, that the Board's regulations, including § 545.8-3(f), do pre-empt state regulation of federal savings and loans,[9] we noted probable jurisdiction. 455 U. S. —— (1982).

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[8] The Court of Appeal refused to ascribe any weight to the absence of ¶ 15 in the third deed of trust at issue here. The court described its earlier discussion of ¶ 15 as

> "not based so much on an agreement between the parties for the application of state law as on the conclusion that the general use of a provision containing such language by federal savings and loan associations with the approval of the Board persuasively evidences a recognition by the Board and federal savings and loan associations that state law would govern the interpretation, validity and enforcement of security instruments." 121 Cal. App. 3d, at 346, 175 Cal. Rptr., at 477.

Nor did the court find significant the fact that this deed covered commercial rather than residential property.

[9] A number of Federal District Courts have concluded that the Board's due-on-sale regulation pre-empts state law. See, *e. g.*, *Price* v. *Florida Federal Sav. & Loan Assn.*, 524 F. Supp. 175, 178 (MD Fla. 1981) (§ 545.8-3(f) is pre-emptive of any state regulation); *First Federal Sav. & Loan Assn.* v. *Peterson*, 516 F. Supp. 732, 740 (ND Fla. 1981) (§ 545.8-3(f)

II

The pre-emption doctrine, which has its roots in the Supremacy Clause, U. S. Const., Art. VI, cl. 2, requires us to examine congressional intent. Pre-emption may be either

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pre-empts Florida due-on-sale restrictions similar to those imposed by California); *Dantus* v. *First Federal Sav. & Loan Assn.*, 502 F. Supp. 658, 661 (Colo. 1980) (analogous ruling with respect to Colorado law); *Bailey* v. *First Federal Sav. & Loan Assn.*, 467 F. Supp. 1139, 1141 (CD Ill. 1979), appeal dism'd, 636 F. 2d 1221 (CA7 1980) (§ 545.8–3(f) forecloses any state regulation of due-on-sale practices of federal savings and loans); *Glendale Federal Sav. & Loan Assn.* v. *Fox*, 459 F. Supp. 903, 907 (CD Cal. 1978), final summary judgment granted, 481 F. Supp. 616 (1979), order reversing and remanding on other grounds reported at 636 F. 2d 1078 (CA9 1981), cert. pending, No. 81–1192 (same). One court has agreed with the California Court of Appeal. See *Holiday Acres No. 3* v. *Midwest Federal Sav. & Loan Assn.*, 308 N.W. 2d 471 (Minn. 1981) (§ 545.8–3(f) does not pre-empt state regulation of due-on-sale clauses).

In addition, at least three Federal Courts of Appeals, several District Courts, and one state supreme court have ruled that various other Board regulations supersede state law. See, *e. g.*, *Conference of Federal Sav. & Loan Assns.* v. *Stein*, 604 F. 2d 1256, 1260 (CA9 1979), summarily aff'd, 445 U. S. 921 (1980) ("In our judgment the regulatory control of the Bank Board over federal savings and loan associations is so pervasive as to leave no room for state regulatory control."); *First Federal Sav. & Loan Assn.* v. *Greenwald*, 591 F. 2d 417, 425–426 (CA1 1979) (Board regulation specifying the conditions under which federal savings and loans must pay interest on escrow accounts pre-empts state law imposing greater interest requirements); *Kupiec* v. *Republic Federal Sav. & Loan Assn.*, 512 F. 2d 147, 150–152 (CA7 1975) (Board regulation supersedes any common law right to inspect savings and loan's membership list); *Meyers* v. *Beverly Hills Federal Sav. & Loan Assn.*, 499 F. 2d 1145, 1147 (CA9 1974) (Board regulation pre-empts the field of prepayments of real estate loans to federal associations); *Rettig* v. *Arlington Heights Federal Sav. & Loan Assn.*, 405 F. Supp. 819 (ND Ill. 1975) (Board regulations and policy statements preempt the field of fiduciary duties of federal savings and loan officers); *Lyons Sav. & Loan Assn.* v. *Federal Home Loan Bank Bd.*, 377 F. Supp. 11 (ND Ill. 1974) (Board regulation displaces state law regarding branching of federal savings and loans); *People* v. *Coast Federal Sav. & Loan Assn.*, 98 F. Supp. 311, 318 (SD Cal. 1951) (federal regulation of savings and loans pre-empts the field); *Kaski* v. *First Federal Sav. & Loan Assn.*, 72 Wis. 2d express or implied, and "is compelled whether Congress' command is explicitly stated in the statute's language or implicitly contained in its structure and purpose." *Jones* v. *Rath Packing Co.*, 430 U. S. 519, 525 (1977). Absent explicit pre-emptive language, Congress' intent to supersede state law altogether may be inferred because "[t]he scheme of federal regulation may be so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it," because "the Act of Congress may touch a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject," or because "the object sought to be obtained by federal law and the character of obligations imposed by it may reveal the same purpose." *Rice* v. *Santa Fe Elevator Corp.*, 331 U. S. 218, 230 (1947).

Even where Congress has not completely displaced state regulation in a specific area, state law is nullified to the extent that it actually conflicts with federal law. Such a conflict arises when "compliance with both federal and state regulations is a physical impossibility," *Florida Lime & Avocado Growers, Inc.* v. *Paul*, 373 U. S. 132, 142–143 (1963), or when state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress," *Hines* v. *Davidowitz*, 312 U. S. 52, 67 (1941). See also *Jones* v. *Rath Packing Co.*, 430 U. S., at 526; *Bethlehem*

132, 141–142, 240 N.W. 2d 367, 373 (1976) (federal law supersedes state regulation of federal savings and loans' lending practices). But see *Derenco, Inc.* v. *Benj. Franklin Federal Sav. & Loan Assn.*, 281 Ore. 533, 577 P. 2d 477, cert. denied, 439 U. S. 1051 (1978) (Board regulation authorizing federal savings and loans to maintain reserve accounts for tax and insurance payments does not occupy the field of reserve accounts or preempt state law requiring payment of interest on such accounts). Cf. *Gulf Federal Sav. & Loan Assn.* v. *Federal Home Loan Bank Bd.*, 651 F. 2d 259, 266 (CA5 1981), cert. pending, No. 81–1744 (Board has authority only over internal management of federal savings and loans, and not over disputed loan agreement provisions).

Steel Co. v. *New York Labor Relations Bd.*, 330 U. S. 767, 773 (1947). These principles are not inapplicable here simply because real property law is a matter of special concern to the States: "The relative importance to the State of its own law is not material when there is a conflict with a valid federal law, for the Framers of our Constitution provided that the federal law must prevail." *Free* v. *Bland*, 369 U. S. 663, 666 (1962); see also *Ridgway* v. *Ridgway*, 454 U. S. 46, 54–55 (1981).

Federal regulations have no less pre-emptive effect than federal statutes. Where Congress has directed an administrator to exercise his discretion, his judgments are subject to judicial review only to determine whether he has exceeded his statutory authority or acted arbitrarily. *United States* v. *Shimer*, 367 U. S. 374, 381–382 (1961). When the administrator promulgates regulations intended to pre-empt state law, the court's inquiry is similarly limited:

> "If [h]is choice represents a reasonable accommodation of conflicting policies that were committed to the agency's care by the statute, we should not disturb it unless it appears from the statute or its legislative history that the accommodation is not one that Congress would have sanctioned." *Id.*, at 383.

See also *Blum* v. *Bacon*, —— U. S. ——, —— (1982) (slip op. 13–14); *Ridgway* v. *Ridgway*, 454 U. S., at 57 (regulations must not be "unreasonable, unauthorized, or inconsistent with" the underlying statute); *Free* v. *Bland*, 369 U. S., at 668.

A pre-emptive regulation's force does not depend on express congressional authorization to displace state law; moreover, whether the administrator failed to exercise an option to promulgate regulations which did not disturb state law is not dispositive. See *United States* v. *Shimer*, 367 U. S., at 381–383. Thus, the Court of Appeal's narrow focus on Congress' intent to supersede state law was misdirected. Rather, the questions upon which resolution of this case rests are whether the Board meant to pre-empt California's due-on-sale law, and, if so, whether that action is within the scope of the Board's delegated authority.

III

As even the Court of Appeal recognized, the Board's intent to pre-empt the *Wellenkamp* doctrine is unambiguous. The due-on-sale regulation plainly provides that a federal savings and loan "continues to have the power" to include a due-on-sale clause in a loan instrument and to enforce that clause "at its option." 12 CFR § 545.8-3(f) (1982). The California courts, in contrast, have limited a federal association's right to exercise a due-on-sale provision to those cases where the lender can demonstrate that the transfer has impaired its security.

The conflict does not evaporate because the Board's regulation simply permits, but does not compel, federal savings and loans to include due-on-sale clauses in their contracts and to enforce those provisions when the security property is transferred. The Board consciously has chosen not to mandate use of due-on-sale clauses "because [it] desires to afford associations the flexibility to accommodate special situations and circumstances." 12 CFR § 556.9(f)(1) (1982).[10] Although compliance with both § 545.8-3(f) and the *Wellenkamp* rule may not be "a physical impossibility," *Florida Lime & Avocado Growers, Inc.* v. *Paul*, 373 U. S., at 142-143, the California courts have forbidden a federal savings and loan from enforcing a due-on-sale clause solely "at its option" and have deprived the lender of the "flexibility" given it by the Board.

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[10] As a practical matter, however, few mortgage instruments are written without due-on-sale clauses. The Federal Home Loan Mortgage Corporation and the Federal National Mortgage Association, which purchase the bulk of mortgages sold in the secondary mortgage market, both require, in the mortgages they buy, either a due-on-sale clause or a provision enabling the lender to demand payment of the loan in seven years. The marketability of a mortgage in the secondary market is critical to a savings and loan, for it thereby can sell mortgages to obtain funds to make additional home loans. See *Schott* Advisory Opinion, at 28-34; Kinzler, Due-on-Sale Clauses: The Economic and Legal Issues, 43 U. Pitt. L. Rev. 441, 452-453 (1982); Comment, 9 Fla. State L. Rev. 645, 646, 650 (1981).

Moreover, the Board recently has "reiterat[ed] its longstanding policy" of authorizing federal savings and loan associations to enforce due-on-sale clauses "subject only to express limitations imposed by the Board." 46 Fed. Reg. 39123, 39124 (1981). The only restrictions specified in the Board's regulation are contained in 12 CFR § 545.8-3(g) (1982).[11] That provision, unlike the *Wellenkamp* doctrine, does not confine a federal association's right to accelerate a loan to cases where the lender's security is impaired. In addition, *Wellenkamp* explicitly bars a federal savings and loan from exercising a due-on-sale clause to adjust a long-term mortgage's interest rate towards current market rates—a due-on-sale practice the Board has approved and views as critical to "the financial stability of the association." See the Board's Advisory Opinion, Resolution No. 75-647, in *Schott* v. *Mission Federal Sav. & Loan Assn.* (*Schott* Advisory Opinion), No. Civ-75-366, at 27 (CD Cal. July 30, 1975).

By further limiting the availability of an option the Board considers essential to the economic soundness of the thrift industry, the State has created "an obstacle to the accomplishment and execution of the full purposes and objectives" of the due-on-sale regulation. *Hines* v. *Davidowitz*, 312 U. S., at

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[11] 12 CFR § 545.8-3(g), which applies to loans made after July 31, 1976, and secured by a home occupied or to be occupied by the borrower, prohibits the exercise of a due-on-sale clause in the same four circumstances listed in ¶ 17 of the uniform mortgage instrument, see n. 2, *supra*: when a lien subordinate to the lender's security instrument is created; when a purchase money security interest for household appliances is created; when a transfer occurs by devise, descent, or operation of law on the death of a joint tenant; or when a leasehold interest of not more than three years is granted with no option to purchase. Section 545.8-3(g) also bars the association from imposing a prepayment penalty when a loan is accelerated by means of a due-on-sale clause, and provides that, under specified circumstances, the lender waives its option to exercise a due-on-sale provision.

67. Cf. *Franklin Nat. Bank* v. *New York*, 347 U. S. 373, 378 (1954) (finding a "clear conflict" between federal law, which authorized national banks to receive savings deposits but did not specifically permit—much less require—advertising by such banks, and New York law, which forbade them from using the word "savings" in their advertising or business).

Contending that the *Wellenkamp* doctrine is not inconsistent with the due-on-sale regulation, however, appellees point to the regulation's second sentence, which provides in pertinent part:

> "[E]xercise by the association of such option (hereafter called a due-on-sale clause) shall be exclusively governed by the terms of the loan contract, and all rights and remedies of the association and borrower shall be fixed and governed by that contract." 12 CFR § 545.8–3(f) (1982).

Appellees interpret this language as incorporating state contract law—and therefore any state law restricting the exercise of a due-on-sale clause. We note, however, that the incorporation of state law does not signify the inapplicability of federal law, for "a fundamental principle in our system of complex national polity" mandates that "the Constitution, laws, and treaties of the United States are as much a part of the law of every State as its own local laws and Constitution." *Hauenstein* v. *Lynham*, 100 U. S. 483, 490 (1879). See also *Testa* v. *Katt*, 330 U. S. 386, 390–392 (1947).[12] Moreover, in

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[12] This principle likewise leads us to reject appellees' contention that, with respect to the two deeds of trust containing ¶ 15, see n. 5, *supra*, appellants did in fact agree to be bound by local law. Paragraph 15 provides that the deed is to be governed by the "law of the jurisdiction" in which the property is located; but the "law of the jurisdiction" includes federal as well as state law.

Moreover, like ¶ 17—the due-on-sale clause in the uniform mortgage instrument, see n. 2, *supra*—¶ 15 typically must be included in any mortgage the Federal Home Loan Mortgage Corporation or the Federal National Mortgage Association purchase in the secondary mortgage market. See n. 10, *supra*. Paragraph 15 was added to the uniform mortgage instruour view, the second sentence of § 545.8–3(f) simply makes clear that the regulation does not empower federal savings and loans to accelerate a loan upon transfer of the security property unless the parties to the particular loan instrument, as a matter of contract, have given the lender that right. Similarly, if the parties to a given contract agree somehow to limit the association's right to exercise a due-on-sale provision, the second sentence of § 545.8–3(f) precludes the lender from relying on the first sentence as authorizing more expansive use of the clause.

Any ambiguity in § 545.8–3(f)'s language is dispelled by the preamble accompanying and explaining the regulation. The preamble unequivocally expresses the Board's determination to displace state law:

> "Finally, it was and is the Board's intent to have . . . due-on-sale practices of Federal associations governed *exclusively* by Federal law. Therefore, . . . exercise of due-on-sale clauses by Federal associations shall be governed and controlled *solely* by [§ 545.8–3] and the Board's new Statement of Policy. *Federal associations shall not be bound by or subject to any conflicting State law which imposes different . . . due-on-sale requirements*, nor shall Federal associations attempt to . . . avoid the limitations on the exercise of due-on-sale clauses delineated in [§ 545.8–3(g)] on the ground that such . . . avoidance of limitations is permissible under State law." 41 Fed. Reg. 18286, 18287 (1976) (emphasis added).[13]

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ment not to elevate state law over federal law, but to provide a uniform choice of law provision to be used when interstate disputes arose regarding the interpretation of a mortgage. See App. to Brief for Federal Home Loan Bank Board and Federal Home Loan Mortgage Corporation as *Amici Curiae* 2a (letter from Henry L. Judy, General Counsel, Federal Home Loan Mortgage Corporation); see also S. Rep. No. 91–761, p. 25 (1970) (letter from Arthur F. Burns, Chairman of the Board of Governors, Federal Reserve System).

[13] Citing *Chrysler Corp.* v. *Brown*, 441 U. S. 281, 315–316 (1979), appellees characterize the preamble as an interpretive regulation that does not

In addition, the Board recently has "confirm[ed]" that the due-on-sale practices of federal savings and loans "shall be governed exclusively by the Board's regulations in preemption of and without regard to any limitations imposed by state law on either their inclusion or exercise." 12 CFR § 556.9(f)(2) (1982). Thus, we conclude that the Board's due-on-sale regulation was meant to pre-empt conflicting state limitations on the due-on-sale practices of federal savings and loans, and that the California Supreme Court's decision in *Wellenkamp* creates such a conflict.[14]

IV

The question remains whether the Board acted within its statutory authority in issuing the pre-emptive due-on-sale regulation. The language and history of the HOLA convince us that Congress delegated to the Board ample authority to regulate the lending practices of federal savings and loans so as to further the Act's purposes, and that § 545.8-3(f) is consistent with those purposes.

A

The HOLA, a product of the Great Depression of the 1930s, was intended "to provide emergency relief with respect to home mortgage indebtedness" at a time when as many as half of all home loans in the country were in default.

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have the binding force of law and therefore cannot pre-empt state law. But *Chrysler Corp.* is not on point because we conclude that § 545.8-3(f) itself supersedes contrary state due-on-sale law; we look to the preamble only for the administrative construction of the regulation, to which "deference is . . . clearly in order." *Udall* v. *Tallman*, 380 U. S. 1, 16 (1965). We need not consider, therefore, the pre-emptive effect of the preamble standing alone.

[14] Because we find an actual conflict between federal and state law, we need not decide whether the HOLA or the Board's regulations occupy the field of due-on-sale law or the entire field of federal savings and loan regulation.

H.R. Conf. Rep. No. 210, 73d Cong., 1st Sess., 1 (1933). See 77 Cong. Rec. 2499 (1933) (remarks of Rep. Hancock); *id.*, at 2570 (remarks of Rep. Reilly); Home Owners' Loan Act: Hearings on S. 1317 Before a Subcommittee of the Senate Committee on Banking and Currency 9 (1933) (Senate Hearings) (statement of Horace Russell, one of the drafters of the bill and General Counsel, Federal Home Loan Bank Board, Atlanta, Ga.). Local institutions that had previously supplied funds to finance homes had ceased doing business or had discontinued such long-term loans, so that more than half the counties in the country, containing almost one-fifth of the total population, were without home-financing institutions. See *id.*, at 7, 19; see also H.R. Rep. No. 55, 73d Cong., 1st Sess., 2 (1933); S. Rep. No. 91, 73d Cong., 1st Sess., 2 (1933); Home Owners' Loan Act: Hearings on H.R. 4980 Before the House Committee on Banking and Currency 16–17 (House Hearings) (April 20, 1933) (statement of William F. Stevenson, Chairman, Federal Home Loan Bank Board); Comment, 11 Pac. L.J. 1085, 1103 (1980) (by 1933, 1700 state-chartered savings and loans had failed, causing losses of some $200 million, about one-third the value of savings in these associations).

In order to ameliorate these conditions, Congress enacted the HOLA, "a radical and comprehensive response to the inadequacies of the existing state systems." *Conference of Federal Sav. & Loan Assns.* v. *Stein*, 604 F. 2d 1256, 1257 (CA9 1979), summarily aff'd, 445 U. S. 921 (1980). The Act provided for the creation of a system of federal savings and loan associations, which would be regulated by the Board so as to ensure their vitality as "permanent associations to promote the thrift of the people in a cooperative manner, to finance their homes and the homes of their neighbors." S. Rep. No. 91, 73d Cong., 1st Sess., 2 (1933); see also H.R. Rep. No. 55, 73d Cong., 1st Sess., 2 (1933); 77 Cong. Rec. 4974 (1933) (remarks of Sen. Bulkley).

Thus, in § 5(a) of the Act, Congress gave the Board plenary authority to issue regulations governing federal savings and loans:

> "In order to provide local mutual thrift institutions in which people may invest their funds and in order to provide for the financing of homes, the Board is authorized, under such rules and regulations as it may prescribe, to provide for the organization, incorporation, examination, *operation*, and *regulation* of associations to be known as 'Federal Savings and Loan Associations', or 'Federal mutual savings banks' . . . , and to issue charters therefor, giving primary consideration to the best practices of local mutual thrift and home-financing institutions in the United States." 12 U. S. C. § 1464(a) (1976 ed., Supp. IV) (emphasis added).

The broad language of § 5(a) expresses no limits on the Board's authority to regulate the lending practices of federal savings and loans. As one court put it, "[i]t would have been difficult for Congress to give the Bank Board a broader mandate." *Glendale Federal Sav. & Loan Assn.* v. *Fox*, 459 F. Supp. 903, 910 (CD Cal. 1978), final summary judgment granted, 481 F. Supp. 616 (1979), order reversing and remanding on other grounds reported at 636 F. 2d 1078 (CA9 1981), cert. pending, No. 81-1192. And Congress' explicit delegation of jurisdiction over the "operation" of these institutions must empower the Board to issue regulations governing mortgage loan instruments, for mortgages are a central part of any savings and loan's "operation." See *Schott* Advisory Opinion, at 21; House Hearings 16 (April 20, 1933) (statement of William F. Stevenson, Chairman, Federal Home Loan Bank Board) ("We are loaning [savings associations] seven million dollars a week and they are lending it pretty largely on homes of the type contemplated in the Act."); Tr. of Oral Arg. 4 (approximately 78% of savings and loan associations' assets are invested in mortgage loan contracts).

Moreover, Congress directed that, in regulating federal savings and loans, the Board consider "the best practices of local mutual thrift and home-financing institutions in the United States," which were at that time all state-chartered. § 5(a) of the HOLA, 12 U. S. C. § 1464(a). By so stating, Congress plainly envisioned that federal savings and loans would be governed by what the Board—not any particular State—deemed to be the "best practices." See also *First Federal Sav. & Loan Assn.* v. *Massachusetts Tax Comm'n*, 437 U. S. 255, 258, n. 3 (1978) (observing that the HOLA "protects federal associations from being forced into the state regulatory mold"). Thus, the statutory language suggests that Congress expressly contemplated, and approved, the Board's promulgation of regulations superseding state law.

Appellees, however, point to the various sections of the HOLA explicitly pre-empting[15] and incorporating[16] state law, and contend that the Board has no additional authority to adopt regulations displacing state law. Although Congress made decisions about the applicability of certain aspects of state law to federal savings and loans, these provisions do not imply that Congress intended no further pre-emption of state law. Rather, Congress invested the Board with broad authority to regulate federal savings and loans so as to effect the statute's purposes, and plainly indicated that the Board need not feel bound by existing state law. Section 5(a) of the HOLA, 12 U. S. C. § 1464(a). We cannot read this broad delegation of power as confining the Board's authority to pre-empt state law to those areas "specifically described by the Act's other provisions." *United States* v. *Southwestern Cable Co.*, 392 U. S. 157, 172 (1968); see also *Phelps Dodge Corp.* v. *NLRB*, 313 U. S. 177, 193–194 (1941).

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[15] See § 5(a) of the HOLA, 12 U. S. C. § 1464(a) (1976 ed., Supp. IV) (exempting federal mutual savings banks formerly organized under state law from "any numerical limitations of State law on the establishment of branch offices and other facilities"); and § 5(h) of the Act, § 1464(h) (pre-empting state taxes on federal savings and loans greater than those imposed on "other similar local mutual or cooperative thrift and home financing institutions"). Cf. § 13 of the Federal Home Loan Bank Act, 12 U. S. C. § 1433 (exempting Federal Home Loan Bank bonds from taxation).

[16] See § 5(a) of the HOLA, 12 U. S. C. § 1464(a) (1976 ed., Supp. IV) (providing that any federal mutual savings bank which was formerly a state-chartered institution is subject to state laws pertaining to discrimination in lending based on neighborhood or geographic area, and to requirements imposed under the Consumer Credit Protection Act, 15 U. S. C. § 1601 *et seq.*); § 5(b)(3) of the Act, § 1464(b)(3) (1976 ed., Supp. IV) (authorizing federal savings and loans to borrow funds from a state mortgage finance agency "to the same extent as" state law permits state-chartered savings and loans to do so); and § 5(c)(4)(A) of the Act, § 1464(c)(4)(A) (1976 ed., Supp. IV) (permitting federal associations to invest in, or lend to, any business development credit corporation incorporated in the State "to the same extent as" state-chartered savings and loans are authorized to do so).

Furthermore, if federal savings and loans were expected to conform to state law except where explicitly pre-empted in the Act itself, the provisions incorporating specific aspects of state law were needlessly repetitive. We decline to construe the Act so as to render these provisions nugatory, "thereby offending the well-settled rule that all parts of a statute, if possible, are to be given effect." *American Textile Mfrs. Institute, Inc.* v. *Donovan*, 452 U. S. 490, 513 (1981). See also *Jarecki* v. *G.D. Searle & Co.*, 367 U. S. 303, 307–308 (1961); cf. *Franklin Nat. Bank* v. *New York*, 347 U. S., at 378 ("We find no indication that Congress intended to make this phase of national banking [*i. e.*, advertising] subject to local restrictions, as it has done by express language in several other instances.").[17]

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[17] Likewise, we find nothing in § 8 of the Federal Home Loan Bank Act of 1932, 12 U. S. C. § 1428, relied on by the dissent, see *post*, at 2, that suggests any limit on the Board's authority to issue regulations pre-empting state law. That provision, which is not even part of the HOLA, speaks only to the Board's authority to examine state laws governing the operation of federal home loan banks, not federal savings and loans, for the purpose of ensuring "[a]dequate protection to a Federal Home Loan Bank in making or collecting advances under th[at] chapter . . . ." 12 U. S. C. § 1428. It does not purport to constrict the Board's power to regulate the

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Because of the exigencies of the times, the HOLA was enacted hurriedly and its legislative history, concededly, is somewhat sparse.[18] But that history does confirm our reading of the statutory language and the Board's plenary authority to regulate the operations of federal savings and loans. Attempting to provide for the "relief of the man who is about to lose his home," Congress set out the general framework and left many of the details to the Board. House Hearings 13 (April 20, 1933) (statement of William F. Stevenson, Chairman, Federal Home Loan Bank Board). Thus, references to the Board's broad discretion to regulate the newly created federal savings and loans appear throughout the legislative history. Nowhere is there a suggestion of any intent somehow to limit the Board's authority.

Chairman Stevenson's testimony during the HOLA hearings suggests that the Act contemplated that federal law would govern the terms of the loan instruments used by federal savings and loans. Discussing § 5(c) of the HOLA, as amended, 12 U. S. C. § 1464(c), Representative Hancock noted: "You are departing from uniformity with respect to loan associations throughout the United States when you say that the thrift associations cannot loan on a piece of real es-

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operations of federal savings and loans and does not negate the explicit language and history of the HOLA.

[18] On April 13, 1933, President F. D. Roosevelt wrote Congress, asking for "legislation to protect small home owners from foreclosure and to relieve them of a portion of the burden of excessive interest and principal payments incurred during the period of higher values and higher earning power." H.R. Doc. No. 19, 73d Cong., lst Sess., 1 (1933). Hearings were held by the House Committee on Banking and Currency on April 20 and 21, 1933, and by the Senate Committee on Banking and Currency on April 20 and 22. The bill was approved by the House on April 28, see 77 Cong. Rec. 2585, and passed the Senate on June 5, see *id.*, at 4995. The President signed the bill into law on June 9, 1933, see *id.*, at 6198, less than two months after he had first requested the legislation.

tate in excess of $20,000." House Hearings 14 (April 21, 1933). The Chairman replied: "That may be true. We are departing in a good many ways. We have a good many [thrift associations] that are in dire straits because they have loaned on property way up yonder in value, and they have their money tied up in hotels, apartment houses and things of that kind, which puts them in a desperate situation." *Ibid.*

Similarly, in response to concern expressed during the Senate hearings that the Act did not prohibit borrowers from obtaining financing and then renting the property, Chairman Stevenson observed: "That would be a matter of regulation. That could be covered by regulation under the bill." Senate Hearings 14. Asked whether the Board would have authority to promulgate such a regulation, Stevenson replied:

> "If the Federal Home Loan Bank Board should choose to make that kind of a regulation it could put that in. A great many of these local private institutions would put that kind of a clause in their loans." *Ibid.*

See also House Hearings 5 (April 20, 1933) (statement of Chairman Stevenson) (referring to "the regulations as to the use of the property after the loan is once obtained"); House Hearings 9 (April 21, 1933) (statement of Mr. Stevenson) ("[I]t is in the discretion of the Board when it will grant [a three-year] extension [of loan payments]."); *id.*, at 18–19 (colloquy between Mr. Stevenson and Rep. Reilly) (noting that the Board has discretion in determining whether to charter a federal association).

The subsequent debates confirm that Congress accepted Chairman Stevenson's offer and furnished the Board with broad power to regulate the federal savings and loans. Thus, Representative Luce, ranking minority member of the House Committee on Banking and Currency, observed that the federal savings and loan associations "will be formed in accordance with the best building-and-loan practice, and I feel sure we may rely upon [Chairman Stevenson] and his

Board to carry out that promise." 77 Cong. Rec. 2480 (1933). "It is contemplated by the bill before us to put the machinery in the hands of the Home Loan Bank Board," and "[w]e give the board great power to administer the act," Representative Luce continued. *Id.*, at 2480, 2481. See also *id.*, at 2481 ("We leave such things [as limitations on conversion of federal home loan banks to federal savings and loans] to the judgment of the board."); *id.*, at 2501 ("The prudent course is to leave this to the judgment of the board, by imposing a maximum [rate of interest] in the bill—4 percent upon what we borrow, 5 percent upon what we lend—and trust this Board . . . to get lower rates for borrowing or make lower rates for lending as the opportunity may come."); *id.*, at 4987 (colloquy between Sens. Hebert and Bulkley) (observing that the Board has discretion in determining when savings and loans should be chartered in areas with existing local thrift institutions).

Thus, the HOLA did not simply incorporate existing local loan practices. Rather, Congress delegated to the Board broad authority to establish and regulate "a uniform system of [savings and loan] institutions where there are not any now," and to "establish them with the force of the government behind them, with a national charter." House Hearings 15 (April 21, 1933) (statement of Chairman Stevenson); *id.*, at 17 (April 20, 1933).[19] And the Board has exercised that discretion, regulating comprehensively the operations of these associations, including their lending practices and, specifically, the terms of loan instruments.[30]

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[19] The postenactment history of the HOLA corroborates the Board's broad authority to regulate the lending practices of federal savings and loans. As part of the Financial Institutions Regulatory and Interest Rate Control Act of 1978, Pub. L. 95-630, 92 Stat. 3641, Congress amended § 5(a) of the HOLA to permit state mutual savings banks to obtain federal charters. During debate in the House, Representative Hanley introduced an amendment providing that those mutual savings banks opting to convert to federally chartered institutions would continue to be subject to state law pertaining to lending discrimination and to regulations imposed under the Consumer Credit Protection Act, 82 Stat. 146, as amended, 15 U. S. C. § 1601 *et seq.*, if the Board determined that state law imposed

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more stringent requirements than federal law. See 124 Cong. Rec. 33847 (1978).

Representative Hanley explained: "In no way, of course, would the use of State law requirements for Federal mutual savings banks be interpreted to erode the Bank Board's long-standing plenary authority over Federal savings and loan associations; Federal law alone would continue to govern these institutions in such areas as branching, anti-discrimination, and lending authority." *Id.*, at 33848. Representative St. Germain, chairman of the Subcommittee on Financial Institutions Supervision, Regulation, and Insurance of the House Committee on Banking, Finance, and Urban Affairs and chief sponsor of the bill, agreed: "This restriction applies only to converted mutual savings banks, and Congress in no way intends to interfere with the longstanding, all-inclusive power of the Bank Board over the activities of Federal savings and loan associations, including branching authority." *Id.*, at 33849. The amendment was agreed to. *Ibid.*

Similiar views were expressed during the Senate debate on the bill. Senator Brooke observed that "we do not intend to interfere with the Bank Board's plenary authority over Federal savings and loan associations, and in this area, Federal law alone would continue to govern." *Id.*, at 36148.

Then, during debate in the House on the Depository Institutions Deregulation and Monetary Control Act of 1980, Pub. L. 96–221, 94 Stat. 132, one Congressman expressed concern that permitting federal savings and loans to make residential real estate loans to the same extent national banking associations were authorized to do so might be interpreted as making "federal savings and loans . . . subject to State requirements." 126 Cong. Rec. H2289 (March 27, 1980) (remarks of Rep. Patterson). Representative St. Germain responded that the Act would expand the federal associations' investment powers "[o]nly if the Federal Home Loan Bank Board permits. Under the Home Owners' Act, the Bank Board has complete authority to determine by regulation the lending practices of Federal associations." *Ibid.*

Although these postenactment events cannot be accorded the weight of contemporary history, they do provide further confirmation of Congress' intent to delegate to the Board broad discretion in regulating the lending practices of federal savings and loans. See *NLRB* v. *Bell Aerospace Co.*, 416 U. S. 267, 275 (1974); *Red Lion Broadcasting Co.* v. *FCC*, 395 U. S. 367, 380–381 (1969).

[30] The Board's extensive regulations govern, for example, fair credit re-

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As we noted above, a savings and loan's mortgage lending practices are a critical aspect of its "operation," over which the Board unquestionably has jurisdiction. Although the Board's power to promulgate regulations exempting federal savings and loans from the requirements of state law may not be boundless, in this case we need not explore the outer limits of the Board's discretion. We have no difficulty concluding that the due-on-sale regulation is within the scope of the Board's authority under the HOLA and consistent with the Act's principal purposes.

Congress delegated power to the Board expressly for the purpose of creating and regulating federal savings and loans so as to ensure that they would remain financially sound institutions able to supply financing for home construction and purchase. Thus, in testifying during the House hearings on the HOLA, the Board's chairman observed: "The new corporations that we propose to set up, we want them set up on a sound basis as they will be of very material assistance in home financing for all time, if properly managed." House Hearings 12 (April 21, 1933). And the relevant House and Senate Reports referred to the federal associations as "permanent" institutions. S. Rep. No. 91, 73d Cong., 1st Sess., 2 (1933); H.R. Rep. No. 55, 73d Cong., 1st Sess., 2 (1933).

The due-on-sale regulation was promulgated with these purposes in mind. The Board has determined that due-on-sale clauses are "a valuable and often an indispensable source of protection for the financial soundness of Federal associations and for their continued ability to fund new home loan commitments." 12 CFR §556.9(f)(1) (1982). Specifically, the Board has concluded that the due-on-sale clause is "an im-

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quirements, the types and amount of loans, collateral required, repayment schedules, initial loan charges, assignment of rents, escrow accounts and interest paid on those accounts, late charges, servicing of loans, and loan payments and prepayments. See 12 CFR §§545.6, 545.8 (1982).

portant part of the mortgage contract" and that its elimination "will have an adverse [e]ffect on the earning power and financial stability of Federal associations, will impair the ability of Federal associations to sell their loans in the secondary markets, will reduce the amount of home-financing funds available to potential home buyers, and generally will cause a rise in home loan interest rates." *Schott* Advisory Opinion, at 2, 17–18.

The Board's analysis proceeds as follows: It observes that the federal associations' practice of borrowing short and lending long—obtaining funds on a short-term basis and investing them in long-term real estate loans, which typically have a 25- to 30-year term—combined with rising interest rates, has increased the cost of funds to these institutions and reduced their income. Exercising due-on-sale clauses enables savings and loans to alleviate this problem by replacing long-term, low-yield loans with loans at the prevailing interest rates and thereby to avoid increasing interest rates across the board. See *id.*, at 21–22. Moreover, the Board has determined that restrictions like the *Wellenkamp* doctrine lengthen the expected maturity date of a lender's mortgages, thus reducing their marketability in the secondary mortgage market. As a result, the Board fears, "the financial stability of Federal associations in California will be eroded and the flow of home loan funds into California will be reduced." *Id.*, at 34.[21]

Admittedly, the wisdom of the Board's policy decision is not uncontroverted.[22] But neither is it arbitrary or capricious. As judges, it is neither our function, nor within our expertise, to evaluate the economic soundness of the Board's approach. In promulgating the due-on-sale regulation, the Board reasonably exercised the authority, given it by Congress, so as to ensure the financial stability of "local mutual thrift institutions in which people . . . invest their funds and . . . [which] provide for the financing of homes." Section 5(a) of the HOLA, 12 U. S. C. § 1464(a) (1976 ed., Supp. IV).[23] By so doing, the Board intended to pre-empt conflict-

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[21] The Board's Due-on-Sale Task Force estimates that the California Supreme Court's restrictions on the exercise of due-on-sale clauses accounted for 40% of the total losses suffered in 1981 by state-chartered associations in the State—some $200 million. See Federal Home Loan Bank Board, Due-on-Sale Task Force Report, 2, 15 (1982). The Task Force projects that imposition of such restrictions nationwide would create, within two years, annual losses of $600 to $800 million for federal savings and loans, and $1.0 to $1.3 billion for all federal and state associations. See *id.*, at 2, 18, 25.

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[22] Those subscribing to the opposite view contend that the unrestricted exercise of due-on-sale clauses may preclude the assumption of mortgages at lower interest rates, thus preventing the sale of homes and transferring the burden of an inflationary market from the lender to the homeowner and prospective homeowner. See, *e. g., Patton* v. *First Federal Sav. & Loan Assn.*, 118 Ariz. 473, 578 P. 2d 152 (1978); *Wellenkamp* v. *Bank of America*, 21 Cal. 3d 943, 582 P. 2d 970 (1978); *Nichols* v. *Ann Arbor Federal Sav. & Loan Assn.*, 73 Mich. App. 163, 250 N.W. 2d 804 (1977).

A number of courts, however, have agreed with the Board's approach. See, *e. g., Williams* v. *First Federal Sav. & Loan Assn.*, 651 F. 2d 910 (CA4 1981); *Tierce* v. *APS Co.*, 382 So. 2d 485 (Ala. 1979); *Malouff* v. *Midland Federal Sav. & Loan Assn.*, 181 Colo. 294, 509 P. 2d 1240 (1973); *Martin* v. *Peoples Mutual Sav. & Loan Assn.*, —— Idaho ——, —— P. 2d —— (1982); *Occidental Savings & Loan Assn.* v. *Venco Partnership*, 206 Neb. 469, 293 N.W. 2d 843 (1980); *Crockett* v. *First Federal Sav. & Loan Assn.*, 289 N.C. 620, 224 S.E. 2d 580 (1976); *Gunther* v. *White*, 489 S.W. 2d 529 (Tenn. 1973).

[23] We therefore reject appellees' contention that the Board's power to regulate federal savings and loans extends only to the associations' internal management and not to any external matters, such as their relationship with borrowers. Although one federal and one state court have drawn this distinction, see *Gulf Federal Sav. & Loan Assn.* v. *Federal Home Loan Bank Bd.*, 651 F. 2d 259, 266 (CA5 1981), cert. pending, No. 81-1744; *Holiday Acres No. 3* v. *Midwest Federal Sav. & Loan Assn.*, 308 N.W. 2d 471, 478 (Minn. 1981), we find no support in the language of the HOLA or its legislative history for such a restriction on the Board's authority.

Moreover, whatever validity the distinction has in theory, it makes little sense here. As the Wisconsin Supreme Court recognized, "[t]he regulation of loan practices directly affects the internal management and operations of federal associations and therefore requires uniform federal con-ing state restrictions on due-on-sale practices like the California Supreme Court's *Wellenkamp* doctrine.

Our inquiry ends there. Accordingly, we hold that the Board's due-on-sale regulation bars application of the *Wellenkamp* rule to federal savings and loan associations.[24]

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trol." *Kaski* v. *First Federal Sav. & Loan Assn.*, 72 Wis. 2d 132, 142, 240 N.W. 2d 367, 373 (1976). In fact, as discussed in the text, the Board's due-on-sale policy is based on the view that due-on-sale clauses are essential to the financial soundness of federal savings and loans; preservation of the associations' very existence is obviously related to their internal management and is one of the functions delegated the Board by Congress.

[24] Pointing out that two of the deeds of trust were executed prior to July 31, 1976, the effective date of § 545.8–3(f), appellees argue that the due-on-sale regulation may not be applied so as to destroy vested rights. Therefore, appellees reason, California law does not conflict with federal law with respect to those two deeds. Appellants respond that § 545.8–3(f) did not interfere with appellees' rights because it merely codified pre-existing law. See n. 4, *supra*.

When the two deeds of trust were executed in 1971 and 1972, California law permitted the unrestricted exercise of due-on-sale clauses upon outright transfer of the security property, as occurred here. The Board's due-on-sale regulation was then issued in 1976, reinforcing Fidelity's right to enforce the due-on-sale provisions. Not until *Wellenkamp* was decided in 1978 was a lender's right under California law to accelerate a loan in response to an outright transfer limited to cases where the security was impaired. The California Supreme Court's prior cases, which forbade the automatic enforcement of due-on-sale provisions when the borrower further encumbered the property securing the loan, *La Sala* v. *American Savings & Loan Assn.*, 5 Cal. 3d 864, 489 P. 2d 1113 (1971), and when the borrower entered into an installment land contract covering all or part of the security property, *Tucker* v. *Lassen Savings & Loan Assn.*, 12 Cal. 3d 629, 526 P. 2d 1169 (1974), permitted the unrestricted exercise of due-on-sale clauses in cases of outright transfers of the security. See 5 Cal. 3d, at 880, 489 P. 2d, at 1123; 12 Cal. 3d, at 637–638, 526 P. 2d, at 1174–1175.

Because we find the *Wellenkamp* doctrine pre-empted by a previously promulgated federal regulation and therefore inapplicable to federal savings and loans, appellees are deprived of no vested rights if Fidelity is permitted to enforce the due-on-sale clauses in the two pre-1976 deeds: the savings and loan had the right to accelerate the loans, pursuant to California law, when the deeds were executed, and that power was never diminished by state law. We have no occasion, therefore, to consider whether

The judgment of the Court of Appeal is reversed.

It is so ordered.

JUSTICE POWELL took no part in the consideration or decision of this case.

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§ 545.8–3(f) may be applied so as to give a savings and loan broader authority to enforce a due-on-sale clause than it had when the deed of trust was executed, or to address appellants' contention that § 545.8–3(f) effected no change in the law.

SUPREME COURT OF THE UNITED STATES

No. 81–750

FIDELITY FEDERAL SAVINGS AND LOAN ASSOCIATION, ET AL., APPELLANTS *v.* REGINALD D. DE LA CUESTA ET AL.

ON APPEAL FROM THE COURT OF APPEAL OF CALIFORNIA, FOURTH APPELLATE DISTRICT

[June 28, 1982]

JUSTICE O'CONNOR, concurring.

I join in the Court's opinion but write separately to emphasize that the authority of the Federal Home Loan Bank Board to preempt state laws is not limitless.* Although Congress delegated broad power to the Board to ensure that federally chartered savings and loan institutions "would remain financially sound," *ante*, at 25, it is clear that HOLA does not permit the Board to preempt the application of all state and local laws to such institutions. Nothing in the language of § 5(a) of HOLA, which empowers the Board to "provide for the organization, incorporation, examination, operation, and regulation" of federally chartered savings and loans, remotely suggests that Congress intended to permit the Board to displace local laws, such as tax statutes and zoning ordinances, not directly related to savings and loan practices. Accordingly, in my view, nothing in the Court's opinion should be read to the contrary.

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*At one point in today's opinion, the Court states that "we need not decide whether the HOLA or the Board's regulations occupy . . . the entire field of federal savings and loan regulation." *Ante*, at 16 n. 14.

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*In footnote 14 of today's opinion the Court states that it "need not decide whether the HOLA or the Board's regulations occupy . . . the entire field of federal savings and loan regulation." *Ante*, at 159, n. 14.

SUPREME COURT OF THE UNITED STATES

No. 81-750

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ON APPEAL FROM THE COURT OF APPEAL OF CALIFORNIA, FOURTH APPELLATE DISTRICT

[June 28, 1982]

JUSTICE REHNQUIST, with whom JUSTICE STEVENS joins, dissenting.

The Court today concludes that in § 5(a) of the Home Owners' Loan Act of 1933, 12 U. S. C. § 1464(a), Congress authorized the Federal Home Loan Bank Board to preempt by administrative fiat California's limitations upon the enforceability of "due-on-sale" clauses in real estate mortgages held by federal savings and loan institutions. The Court reaches this extraordinary result by concluding that due-on-sale clauses relate to a savings and loan's mortgage lending practices which "are a critical aspect of its 'operation' over which the Board unquestionably has jurisdiction." *Ante*, at 24. Because I conclude that Congress has not authorized the Board to promulgate a regulation such as 12 CFR § 545.8-3(f), I dissent.

Section 5(a) of the HOLA, 12 U. S. C. § 1464(a), unquestionably grants broad authority to the Board to regulate the mortgage lending practices of federal savings and loans. In order to perform this role, the Board may take into account state property and contract law which governs real estate transactions in general and the enforceability and interpretation of mortgage lending instruments in particular. Thus, it would be within the Board's power to determine that it constitutes an unsafe lending practice for a federal savings and loan to conclude a real property mortgage without a fully enforceable due-on-sale clause. It would be within the authority delegated to it by Congress for the Board to conclude that a due-on-sale clause must be included in a mortgage instrument as a means of enabling a federal savings and loan to remove unprofitable loans from its portfolio.

Such a regulation would be entirely consistent with the approach taken by Congress in regulating the savings and loan industry. In § 8 of the Federal Home Loan Bank Act of 1932 (FHLBA), 12 U. S. C. § 1428, the precursor to HOLA, Congress has required the Board to examine state law "relating to the conveying or recording of land titles, or to homestead and other rights, or to *the enforcement of the rights of holders of mortgages on lands securing loans*." (Emphasis added). Section 8 provides further:

> "If any such examination shall indicate, in the opinion of the board, that under the laws of any such State . . . there would be inadequate protection to a Federal Home Loan Bank in making or collecting advances under this chapter, the *board may withhold or limit the operation* of any Federal Home Loan Bank in such State until satisfactory conditions of law . . . shall be established." 12 U. S. C. § 1428 (Emphasis added).

Thus, there is no indication in the FHLBA that the Board may, by promulgating regulations, preempt those state laws that are deemed to be economically unsound. Instead, if the Board concludes that California's limitations upon the enforceability of due-on-sale clauses endangers the soundness of the system established by the HOLA and the FHLBA, then the response contemplated by Congress is for the Board to "withhold or limit the operation" of the system in California.

In declaring the due-on-sale clause enforceable as a matter of federal law, however, the Board has departed from the approach contemplated by Congress. Although Congress has authorized the Board to regulate the lending activities of federal savings and loan associations, there is no indication in the HOLA itself, or in its legislative history, that Congress has empowered the Board to determine whether and when federal law shall govern the enforceability of particular provisions contained in mortgages concluded by federal savings and loan associations. If anything, § 8 of the FHLBA indicates that it was Congress' understanding in 1932 that the enforceability of provisions in mortgages is a matter of state law. Contract and real property law are traditionally the domain of state law. *Aronson* v. *Quick Point Pencil Co.*, 440 U. S. 257, 262 (1979); *Butner* v. *United States*, 440 U. S. 48, 55 (1979). In the HOLA, Congress did not intend to create a federal common law of mortgages. See *Texas Industries, Inc.* v. *Radcliff Materials, Inc.*, 451 U. S. 630 (1981).*

The Board's attempt to enforce due-on-sale clauses as a matter of federal law cannot be upheld as a regulation of mortgage lending practices of federal savings and loan associations. In § 545.8-3(f), the Board has gone beyond regulating how, when, and in what manner a federal savings and loan may lend mortgage money. Instead, as the Court recognizes, *ante*, at 4, the Board's regulation purports to create a rule of law which will govern the rights and obligations of the parties to the mortgage instrument. This regulation does not simply delineate those provisions a federal savings and loan must or must not include in a mortgage instrument. Section 545.8-3(f) purports to guarantee the enforceability of a contractual provision notwithstanding state law to the contrary. In this case, the Board is not regulating the operation

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*The Board, however, has argued that federal common law does govern the contractual relationship between federal savings and loan institutions and their mortgagors. See *Gulf Fed. S. & L.* v. *Federal Home Loan Bank Board*, 651 F. 2d 259, 266 (CA5 1981), cert. pending No. 81-1744; Brief for Federal Home Loan Bank Board as *Amicus Curiae* 26, n. 21.

of federal savings and loan associations, but the operation of due-on-sale clauses. Without a congressional authorization more explicit than that relied upon by the Court, I conclude that the Board has entered a domain in which it is not authorized to override state laws.

The limitations the California courts have placed upon the enforceability of due-on-sale clauses do not impair the ability of the Board to regulate the manner in which federal savings and loan associations engage in mortgage lending. California has not interfered with the Board's determination that it constitutes an unsafe lending practice for a federal savings and loan to enter a loan agreement without a fully enforceable due-on-sale clause. California's rule regarding due-on-sale clauses is not invalid pursuant to the Supremacy Clause simply because it makes it difficult for lenders to eliminate unprofitable mortgage loans from their portfolios.

Although the Board has concluded that the California courts' limitations upon the enforceability of due-on-sale clauses is economically unsound, I cannot agree that Congress has enabled the Board to insulate federal savings and loans from California mortgage law merely by promulgating a regulation that declares these clauses to be enforceable. Discharge of its mission to ensure the soundness of federal savings and loans does not authorize the Federal Home Loan Bank Board to intrude into the domain of state property and contract law that Congress has left to the States.

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All issues available have been filmed.
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(Slip Opinion)

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Lumber Co.*, 200 U. S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

BLUM, COMMISSIONER, DEPARTMENT OF SOCIAL SERVICES OF NEW YORK v. BACON ET AL.

APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

No. 81-770. Argued April 28, 1982—Decided June 14, 1982

New York's Emergency Assistance (EA) program, which is federally funded under the Social Security Act (SSA), precludes the furnishing of EA cash to persons receiving or eligible for Aid to Families with Dependent Children (AFDC) or of EA in any form to replace a lost or stolen AFDC grant. Appellees, who had been denied EA under these state provisions, brought a class action in Federal District Court to enjoin enforcement of the provisions, alleging that they conflicted with the SSA and violated equal protection. Ultimately, on remand after its decision invalidating the state provisions under the Supremacy Clause had been vacated by the Court of Appeals, the District Court invalidated the no-cash provision as a violation of equal protection but upheld the loss-or-theft provision. On a second appeal, the Court of Appeals held that both provisions violated the Equal Protection Clause of the Fourteenth Amendment.

Held: Because the New York provisions conflict with a valid federal regulation promulgated by the Secretary of Health, Education, and Welfare (Secretary) which proscribes inequitable treatment of individuals or groups under an EA program, they are invalid under the Supremacy Clause. Pp. 5–14.

(a) Reliance on the SSA to find the New York provisions invalid is not foreclosed by *Quern* v. *Mandley*, 436 U. S. 725. While *Quern* emphasized that a State retains considerable flexibility in determining which emergencies to cover under its EA plan, it was not suggested that the Secretary was stripped of all authority to review a plan that arbitrarily or inequitably excluded a class of recipients. Pp. 6–7.

(b) The Secretary's decision to apply the "equitable treatment" regulation so as to forbid a State to exclude AFDC recipients from its EA

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program is eminently reasonable and deserves judicial deference, especially where the legislative history leaves no doubt that AFDC recipients were expected to be included in a state EA program. Pp. 8–13.

648 F. 2d 801, affirmed.

MARSHALL, J., delivered the opinion for a unanimous Court.

NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D.C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

SUPREME COURT OF THE UNITED STATES

No. 81-770

BARBARA BLUM, ETC., APPELLANT *v.*
JEANNE BACON, ETC., ET AL.

APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

[June 14, 1982]

JUSTICE MARSHALL delivered the opinion of the Court.

New York has established an Emergency Assistance Program that receives substantial federal funding under Title IV–A of the Social Security Act (Act), 42 U. S. C. § 603(a)(5). The program excludes recipients of Aid to Families with Dependent Children (AFDC) from emergency assistance in the form of cash. It also excludes public assistance recipients (including AFDC recipients) from reimbursement for lost or stolen grants, even though it provides such reimbursement to other public benefit recipients. The United States Court of Appeals for the Second Circuit held that New York's treatment of AFDC recipients is not inconsistent with the federal Act and regulations but violates the Equal Protection Clause. Because we conclude that the New York law is invalid under the Act, we affirm without reaching the equal protection issue.

I

Appellee Jeanne Bacon has two minor children and depends entirely on an AFDC grant to support her family. On June 1, 1977, while she was shopping, her wallet and food stamps were stolen. She promptly reported the theft to the police and to the New York Department of Social Services (DSS). She requested emergency assistance (EA) under the state's federally-funded Emergency Assistance Program, explaining that she had no money to purchase food and other essential items for her household for the month. DSS denied her request on the basis of a recent state law which precludes the furnishing of any cash EA to persons receiving or eligible for AFDC, N. Y. Soc. Serv. Law § 350–j(2)(c) & § 350–j(3) (McKinney) (the "no-cash" provision), or of EA in any form to replace a lost or stolen public assistance grant, including an AFDC grant. N. Y. Soc. Serv. Law § 350–j(2)(e) (McKinney) (the "loss-or-theft" provision).[1] Appellee Gertrude

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[1] New York Soc. Serv. Law § 350–j provides in pertinent part:

"2. For purposes of this section, the term 'emergency assistance' means aid, care and services authorized during a period not in excess of thirty days in any twelve month period to meet the emergency needs of a child or the household in which he is living, in the following circumstances:

(a) where the child is under twenty-one years of age; and

(b) the child is living with, or within the previous six months has lived with, one or more persons specified in subdivision b of section three hundred forty-nine of this chapter; and

(c) *in cases of applications for grants of cash assistance, such child or such household is not categorically eligible for or receiving aid to dependent children*; and

(d) such emergency needs resulted from a catastrophic occurrence or from a situation which threatens family stability and which has caused the destitution of the child and/or home; and

(e) such occurrence or situation could not have been foreseen by the applicant, was not under his control, *and, in the case of a person receiving public assistance, did not result from the loss, theft or mismanagement of a regular public assistance grant*; and

(f) the emergency grant being applied for will not replace or duplicate a public assistance grant already made under section one hundred thirty-one-a of this chapter.

3. Emergency assistance to needy families with children shall be provided to the extent of items of need and services set forth in sections one hundred thirty-one and one hundred thirty-one-a of this chapter . . . . *Such emergency assistance, but not including cash grants, may be furnished to a family eligible for aid to dependent children only in the form of emergency services*, and so long as federal aid remains available, for emergency fuel grants in the form of vendor restricted payments." (emphasis added).

Parrish suffered a similar fate. An AFDC mother, she lost her food and AFDC funds when her apartment was broken into and ransacked. She applied for EA, and DSS denied her request on the same basis as it denied relief to appellee Bacon. The other named appellees, Linda Selders and Freddie Mae Goodwine, also were denied emergency assistance after they cashed their AFDC checks and suffered the loss of their money.[2]

Appellees brought this class action to enjoin enforcement of the state law insofar as it denies EA pursuant to the no-cash provision and the loss-or-theft provision.[3] Appellees argued that the law conflicts with the Act and violates equal protection because it arbitrarily discriminates against AFDC recipients: it provides cash EA to all eligible recipients other than AFDC recipients, and provides EA for lost or stolen public benefit grants to all public benefit recipients (such as recipients of social security and Supplemental Security Income) other than those on public assistance (including AFDC recipients).

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[2] The record indicates that appellees have standing to challenge the no-cash as well as the loss-or-theft provision. In the case of appellees Bacon, Parrish, and Goodwine, the New York Department of Social Services (DSS) purported to rely on the loss-or-theft provision in denying EA. However, Parrish was denied EA for lost food as well as lost money. The no-cash provision, not the loss-or-theft provision, would appear to justify denial of EA for the lost food, since that loss did not result from the theft of her public assistance *grant*.

In the case of appellee Selders, DSS denied EA for her lost cash pursuant to an administrative memorandum that outlines both the no-cash and the loss-or-theft exclusions for AFDC recipients. App. 34–37, 51. It is therefore unclear which exclusion the state purported to rely upon in denying assistance. However, Selders lost a food stamp voucher as well as the cash from her AFDC grant. DSS refused to provide the cash equivalent of the voucher. Although DSS replaced the voucher, Selders was unable to make use of the replacement because she had no cash. 437 F.Supp., at 1376–1377. Accordingly, it was the state's no-cash rule that prevented her from obtaining effective EA. *Id.*, at 1384–1385. Selders alone was denominated a representative of the subclass of plaintiffs challenging the no-cash rule. *Id.*, at 1381.

In light of these facts and appellant's concession that it relied upon both the no-cash and the loss-or-theft provisions in denying assistance, Brief for Appellant 6–7; Tr. of Oral Argument 4, 17, we conclude that appellees have standing to challenge both provisions.

[3] Appellees also sought to enjoin enforcement of the statutory provision denying replacement or duplication of a public assistance grant already made. N. Y. Soc. Serv. Law § 350–j(2)(f) (McKinney). They no longer seek relief with respect to that provision because the District Court deter-

The United States District Court for the Southern District of New York granted summary judgment in favor of appellees on the ground that the state provisions impermissibly narrowed the eligibility standards imposed on state EA programs by §406(e) of the Act, 42 U. S. C. §606(e),[4] and were thus invalid under the Supremacy Clause. *Bacon* v. *Toia*,

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mined that the provision does not preclude EA in the event of a true emergency. 493 F.Supp., at 875.

[4] Section 406(e) of the Act provides in part:

"(1) The term 'emergency assistance to needy families with children' means any of the following, furnished for a period not in excess of 30 days in any 12-month period, in the case of a needy child under the age of 21 who is . . . living with any of the relatives specified in subsection (a)(1) of this section in a place of residence maintained by one or more of such relatives as his or their own home, but only where such child is without available resources, the payments, care, or services involved as necessary to avoid destitution of such child or to provide living arrangements in a home for such child, and such destitution or need for living arrangements did not arise because such child or relative refused without good cause to accept employment or training for employment—

"(A) money payments, payments in kind, or such other payments as the State agency may specify with respect to, or medical care or any other type of remedial care recognized under State law on behalf of, such child or any other member of the household in which he is living, and

"(B) such services as may be specified by the Secretary;

"but only with respect to a State whose State plan approved under section 602 of this title includes provision for such assistance.

"(2) Emergency assistance as authorized under paragraph (1) may be provided . . . to migrant workers with families in the State or in such part or parts thereof as the State shall designate."

437 F.Supp. 1371 (1977). The United States Court of Appeals for the Second Circuit affirmed. 580 F. 2d 1044 (1978). Shortly thereafter, this Court decided *Quern* v. *Mandley*, 436 U. S. 725 (1978), in which we held that § 406(e) imposes permissive, not mandatory, standards on participating states. The Court of Appeals granted a motion for rehearing, vacated the judgment of the District Court, and remanded the case for further consideration in light of *Quern*. On remand, the District Court reversed its prior decision and held that the New York law was not inconsistent with the federal Act. In a subsequent opinion, the District Court invalidated the no-cash provision as a violation of equal protection but upheld the loss-or-theft provision. 493 F.Supp. 865 (1980). On the second appeal, the Court of Appeals agreed with the District Court that our decision in *Quern* foreclosed a finding that the law violates the Supremacy Clause. The Court of Appeals concluded, however, that both the no-cash and loss-or-theft provisions violate equal protection. 648 F. 2d 801 (1981). We noted probable jurisdiction. —— U. S. ——.

II

Where a party raises both statutory and constitutional arguments in support of a judgment, ordinarily we first address the statutory argument in order to avoid unnecessary resolution of the constitutional issue. See *Califano* v. *Yamasaki*, 442 U. S. 682, 692–693 (1979); *Hagans* v. *Lavine*, 415 U. S. 528, 543 (1974).[5] We conclude that this case may be resolved on statutory grounds. As we explain below, the New York no-cash and loss-or-theft rules conflict with valid federal regulations promulgated by the Secretary of Health, Education and Welfare (Secretary) which proscribe inequitable treatment under the EA program. Thus, New York's rules are invalid under the Supremacy Clause.

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[5] Appellant argues that the statutory issue is not properly before us. It is well accepted, however, that without filing a cross-appeal or cross-petition, an appellee may rely upon any matter appearing in the record in support of the judgment below. See *Massachusetts Mutual Life Ins. Co.* v. *Ludwig*, 426 U. S. 479 (1976) (*per curiam*); *Dayton Board of Education* v. *Brinkman*, 433 U. S. 406, 419 (1977); see also R. Stern & E. Gressman, Supreme Court Practice 478 (5th ed. 1978). Moreover, the statutory issue was raised and decided in both the District Court and the Court of Appeals.

A

Before reviewing the federal regulations that we find to be dispositive of this case, we first address appellant's claim that reliance on the Social Security Act is foreclosed by our decision in *Quern* v. *Mandley*, 436 U. S. 725 (1978). In that case, we carefully reviewed the nature and scope of the EA program and examined one aspect of its relationship to the AFDC program.[6] Under Title IV-A of the Act, state public assistance plans approved by the Secretary are eligible for federal financial assistance. AFDC is a major categorical aid program funded under the Act—indeed, it is "the core of the Title IV-A system." *Id.*, at 728. States are required, as a condition of federal funding under the AFDC program, to make assistance available to all persons who meet statutory eligibility criteria. *Id.*, at 740; 42 U. S. C. §§ 602(a)(10), 606(a). The EA program is a supplement to such categorical assistance programs as AFDC. It permits federal reimbursement to states which choose to provide for temporary emergency assistance in their Title IV-A plans. 42 U. S. C.

Appellant also asserts that the appellees were required to file a cross-appeal because they seek to modify the judgment below. Acceptance of the appellees' statutory argument will allegedly result in such a modification because "the injunction granted below on the basis of constitutional right would be modified to one based upon statute or regulation." Reply of Appellant to Motion to Affirm 8. Appellant cites no authority for this novel view that an affirmance which does not alter the relief ordered in the judgment below "modifies" the judgment simply because the affirmance rests on a different legal basis than the court below adopted.

[6] For a general discussion of the EA and AFDC programs, see *Quern* v. *Mandley*, 436 U. S. 725, 728–729, 735–736, 739, 742–743 (1978).

§ 603(a)(5). In contrast to AFDC, the EA program establishes much broader eligibility standards and is not limited to persons eligible for AFDC. 42 U. S. C. § 606(e).

Plaintiffs in *Quern* made the broad claim that a state participating in the federal EA program may not limit eligibility for EA more narrowly than the federal eligibility standards in § 406(e). The state plan at issue provided emergency assistance only to certain AFDC families who were without shelter and to applicants presumptively eligible for AFDC who were in immediate need of clothing or household furnishings. We rejected the plaintiffs' broad claim and held that unlike the AFDC program, § 406(e) establishes only permissive, not mandatory, eligibility standards.

Quern did not address the statutory issue before us today—whether the complete and automatic exclusion of AFDC recipients from a state's EA program is inconsistent with the Act and applicable regulations. The Court had no occasion to consider the question, since the EA program in that case included *only* AFDC recipients. In addition, the only pertinent federal regulations in *Quern* undermined the plaintiffs' claims and supported the state's rules. See 436 U. S., at 743–744 n. 19; 45 CFR § 233.120 (1981). Here, on the other hand, the Secretary has promulgated a regulation inconsistent with New York's no-cash and loss-or-theft rules. See 45 CFR § 233.10 (1981); *infra*, at ——.[7] In short, although we emphasized in *Quern* that states retain considerable flexibility in determining which emergencies to cover under its EA plan, we hardly suggested that the Secretary had been stripped of all authority to review a plan that arbitrarily or inequitably excluded a class of recipients.

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[7] In a footnote, the Court reported that some states have narrowed eligibility for EA programs by excluding AFDC recipients if the emergency need is one theoretically covered by the basic assistance grant. 436 U. S., at 739–740 n. 16. This descriptive statement is not, of course, an expression of opinion, much less a holding, with respect to the issue before us.

B

The Secretary, who is charged with administering federal funding for EA under the Act, has promulgated the following regulation applicable to state plans under Title IV–A, including EA programs:

> "(a) *State plan requirements.* A State plan under title I, IV–A, X, XIV, or XVI, of the Social Security Act must:
>
> (1) Specify the groups of individuals, based on reasonable classifications, that will be included in the program, and all the conditions of eligibility that must be met by the individuals in the groups. The groups selected for inclusion in the plan and the eligibility conditions imposed must not exclude individuals or groups on an arbitrary or unreasonable basis, and must not result in inequitable treatment of individuals or groups in the light of the provisions and purposes of the public assistance titles of the Social Security Act." 45 CFR § 233.10 (1981).

The Secretary has also issued regulations exclusively addressed to the EA program. 45 CFR § 233.120 (1981).[8]

On the authority of these regulations, the Secretary has specifically required the inclusion of AFDC recipients in any EA program, and has disapproved New York's EA plan because it excludes AFDC recipients as a class. Shortly after this Court's decision in *Quern*, the Office of Family Assistance of the Social Security Administration issued Action Transmittal SSA-AT-78-44 addressed to state agencies administering approved public assistance programs. The Transmittal explains that after *Quern*, "States remain free, under Federal policy to develop their own definition of the kind of emergencies they will meet under this program." App. 173. Nevertheless, "*[a] State Plan must clearly specify that AFDC recipients are included in its EA program.* Other categories of needy families with children may be included at State option; these categories must be specified in the plan." App. 174 (emphasis added). In an *amicus* brief filed at the invitation of the Court of Appeals below, the Secretary confirmed that New York's exclusion of AFDC recipients through its no-cash and loss-or-theft provisions violates its regulations, in particular its "equitable treatment" regulation, 45 CFR § 233.10. App. to Motion to Affirm 12-17. As the Secretary interpreted that regulation, the discrimination in New York's program is not justified by, or tailored to, the purposes of the EA program. *Ibid.*[9]

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[8] These regulations were adopted pursuant to § 1102 of the Act, 42 U. S. C. § 1302, which provides the Secretary with authority to "make . . . such rules and regulations, not inconsistent with this chapter, as may be necessary to the efficient administration of the functions with which [he] is charged under this chapter." We have described this provision as creating "broad rule-making powers." *Thorpe* v. *Housing Authority*, 393 U. S. 268, 277 n. 28 (1969). The Secretary has also argued that 45 CFR § 233.10(a)(1) is authorized pursuant to § 402(a)(5), 42 U. S. C. § 602(a)(5), under which a state plan under Title IV–A "must . . . provide such methods of administration . . . as are found by the Secretary to be necessary for the proper and efficient operation of the plan." See App. to Motion to Affirm 8. This section applies to all portions of a state plan under Title IV–A, including the EA program. See *Quern*, 436 U. S., at 741–742.

We agree that New York's law is invalid under the equitable treatment regulation insofar as it automatically excludes

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[9] It appears that the Secretary has consistently taken the position that automatic exclusions of AFDC recipients from an EA program violate the "equitable treatment" regulation, 45 CFR § 233.10. In an *amicus* brief filed at the invitation of the Court in *Ingerson* v. *Pratt*, Civ. Action No. 76-3255-S (Ma., Nov. 14, 1979), the Secretary stated that the regulation applies to EA programs. The Office of Family Assistance later determined that Massachusetts' "recipient status" rule violates the regulation because it provides that the EA benefits available to AFDC recipients will be affected by the amount received in the AFDC grant, whereas the EA benefits available to non-AFDC recipients will not be affected by the amount of assistance received. Documentation of the U. S. Dept. of HEW relating to *Ingerson* v. *Pratt*, File of the Clerk of this Court. The District Court has invalidated this rule (as well as another state rule) based on the "equitable treatment" regulation. *Ingerson* v. *Pratt* (Ma., Feb. 8, 1982).

AFDC recipients from the EA program. The regulation, and the Secretary's decision to apply it to strike down New York's no-cash and loss-or-theft rules, clearly deserve judicial deference. We have often noted that the interpretation of an agency charged with the administration of a statute is entitled to substantial deference. See, *e. g.*, *Federal Election Commission* v. *Democratic Senatorial Campaign Committee*, —— U. S. —— (1981); *Quern*, 436 U. S., at 738. In light of the strong support in the legislative history for the Secretary's conclusion that the automatic exclusion of AFDC recipients from an EA program is inequitable in light of the purposes of the EA program, we find such deference particularly appropriate in this case.

C

In 1967, Congress thoroughly revised the Social Security Act, including many of its public assistance provisions. The House and Senate committee reports concerning the portion of the revision that would ultimately become the EA program[10] make it unmistakeably clear that AFDC recipients were expected to benefit from the program. The initial House report states:

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[10] The EA program, a small part of the 1967 Social Security Amendments, originated with the President's limited proposal to extend temporary assistance to migratory workers. See H. R. 5710, 90th Cong., 1st Sess., 122–123 (1967). The assistance "would be in an amount consistent with what the individuals would receive if they were eligible under a public assistance plan in the State in which they are living." House Committee on Ways and Means, Section-by-section Analysis of H. R. 5710, 90th Cong., 1st Sess. 9 (Comm. Print 1967). In the House, the Ways and Means Committee adopted a much broader proposal, very similar to the version ultimately enacted. See H. R. 12080, 90th Cong., 1st Sess. 137–139 (1967). After House passage, the Senate made three changes—increasing the amount of time that emergency assistance would be available, denying assistance if a child or relative refused without good cause to accept employment, and more explicitly protecting migrant workers. In conference, the second and third changes were accepted. H. R. Conf. Rep. No. 1030, 90th Cong., 1st Sess., p. 60 (1967). Congress adopted the conference bill.

> "Your committee understands that the process of determining eligibility and authorizing payments frequently precludes the meeting of emergency needs when a crisis occurs. In the event of eviction, or when utilities are turned off, or when an alcoholic parent leaves children without food, immediate action is necessary. It frequently is unavailable under State programs today. When a child is suddenly deprived of his parents by their accidental death or when the agency finds that the conditions in the home are contrary to the child's welfare, the normal methods of payment have to be suspended while new arrangements and court referrals are made.
>
> "To encourage public welfare agencies to move promptly and with maximum effectiveness in such situations, the bill contains an offer to the States of 50-percent participation in emergency assistance payments. . . . The eligible families involved are those with children under 21 who either are or have recently been living with close relatives. *The families do not have to be receiving or eligible upon application to receive AFDC (although they are generally of the same type)*, but they must be without available resources. . . .
>
> "Assistance might be in any form. . . . The provision is broad enough that emergencies can be met in migrant families *as well as those meeting residence requirements of the State's AFDC program*. Its utilization would be optional with the States." H. R. Rep. No. 544, 90th Cong., 1st Sess., p. 109 (1967) (emphasis added).

This passage leaves the obvious implication that persons who are eligible for AFDC benefits would receive EA. The Senate report is almost identical, except for an explanation of the changes in the Senate bill. S. Rep. No. 744, 90th Cong., 1st Sess. 165–166 (1967).[11] Indeed, in an earlier summary of this provision, the Senate report describes emergency assistance as one of a series of amendments that "would set up new protections for the children in AFDC families." *Id.*, at 146.[12]

The House and Senate debates on this portion of the Social Security Amendments, although abbreviated, buttress our understanding of Congressional intent. Senator Long, floor manager of the bill, repeated the Senate report's characterization of emergency assistance as one of several changes that would establish "new protections for the children in AFDC families." 113 Cong. Rec. 32592 (1967). Comments by other legislators reveal a similar understanding.[13] Testimony by witnesses and statements introduced at the Senate hearings on the bill are also illuminating. Many statements assume that AFDC would be covered, and some reveal the belief that EA would be principally an AFDC program.[14]

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[11] The Senate report also inserts "AFDC" prior to the word "eligibility" in the first sentence quoted in the text above—yet another indication that those eligible for or receiving AFDC were presumed to be covered.

[12] Other portions of the legislative documents indicate that the EA program was viewed as an extension of the AFDC program. For example, the House bill initially contained the title, "Emergency Assistance for Certain Needy *Families with Dependent Children.*" H. R. 12080, 90th Cong., 1st Sess. 137 (1967) (emphasis added). The bill as enacted placed the EA provisions within Subchapter IV–A of the Social Security Act, 42 U. S. C. § 601 *et seq.*, entitled "Aid to Families With Dependent Children." 42 U. S. C. §§ 603(a)(5), 606(e). Moreover, numerous historical documents place discussion of the EA program within an "AFDC" category. See, *e. g.*, H. R. Rep. No. 544, 90th Cong., 1st Sess. 97 (1967); Senate Committee on Finance, Social Security Amendments of 1967: Comparison of H. R. 12080, As Passed by the House of Representatives, with Existing Law, 90th Cong., 1st Sess. 37–38 (Comm. Print 1967); S. Rep. No. 744, 90th Cong., 1st Sess. 4, 165–166 (1967); Senate Committee on Finance, The Social Security Amendments of 1967, Brief Summary of Major Provisions and Detailed Comparison with Prior Law, 90th Cong., 1st Sess. 68–69 (1968).

[13] Congress expressed concern that categorical aid programs (which include AFDC) were often too inflexible to afford immediate emergency relief. The implicit assumption is that if a state EA plan covered emergency needs that were not promptly met under these programs, persons receiving or eligible for aid under the programs would receive EA. Thus, Sena-

III

The Secretary's decision to apply the "equitable treatment" regulation so as to forbid a state from excluding AFDC recipients from its EA program is eminently reasonable and deserves judicial deference. The regulation explicitly forbids the "inequitable treatment of individuals or groups in the light of the provisions and purposes of the public assistance titles of the Social Security Act." 45 CFR § 233.10 (1981). AFDC recipients are "the core of the Title IV-A system," *Quern*, 436 U. S., at 728, and the principal group of beneficiaries under federally-assisted state welfare programs. Moreover, the legislative history reviewed above leaves no doubt that AFDC recipients were expected to be included in a state EA program receiving federal financial assistance.

Because New York's no-cash[15] and loss-or-theft rules conflict with a valid federal regulation, they are invalid under

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tor Ribicoff emphasized that welfare agencies need to have "flexibility" in dealing with emergencies; and Senator Curtis explained that "[f]or a period of 30 days, emergency assistance can be paid in cases where [EA recipients] cannot meet other qualifications." *Id.*, at 32853, 36319.

[14] Hearings on H. R. 12080 before the Senate Committee on Finance, 90th Cong., 1st Sess. 1034 (1967) (Statement of Commissioner, Lousiana Dept. of Public Welfare); *id.*, App. 8 (Statement of Alabama Dept. of Pensions and Security); *id.*, App. 125 (Statement of Governor of Hawaii); *id.*, App. 289 (Statement of Rhode Island Dept. of Social Welfare).

[15] Appellant asserts that the no-cash rule does not discriminate against AFDC recipients at all. On its face, of course, the rule excludes AFDC as well as all other public assistance recipients and thus violates the regulation. But appellant claims that AFDC recipients may obtain the same emergency benefits through special grants under other provisions of the state welfare law. Both lower courts rejected this claim, concluding that

the Supremacy Clause. See *Chrysler Corp.* v. *Brown*, 441 U. S. 281, 295–296 (1979). In light of our disposition of this Supremacy Clause claim, we do not address appellees' equal protection argument.[16]

The judgment of the Court of Appeals is affirmed.

It is so ordered.

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the special grant provisions are more limited than EA provisions. 648 F. 2d, at 807–808; 493 F.Supp., at 872–873. In particular, the Court of Appeals, after reviewing relevant state cases, determined that the state EA program would provide grants in cases of loss caused by burglary, public auction following eviction, and would provide food and other immediate living expenses, while special grants would not cover these items. 648 F. 2d, at 808. We have no reason to question the conclusion of the lower courts, given their familiarity with state law. See *Bishop* v. *Wood*, 426 U. S. 341, 346 (1976).

Of course, we do not suggest that a state may not choose to provide AFDC special grants for emergencies as an alternative to including AFDC recipients within the EA program, if the special grants are provided as promptly and for the same emergencies as the EA grants. Cf. *Quern*, 436 U. S., at 734–739.

[16] We do not reach the question whether the loss-or-theft provision in N. Y. Soc. Serv. Law § 350–j is invalid as applied to public assistance recipients *other* than those receiving AFDC. The question presented in appellant's jurisdictional statement refers only to the discrimination against AFDC recipients; thus, appellant challenges the judgment below only insofar as it requires the granting of EA to AFDC recipients.

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All issues available have been filmed.
Unfortunately, any scattered missing issues are no longer available.

981/81-5114

(Slip Opinion)

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Lumber Co.*, 200 U. S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

TIBBS *v.* FLORIDA

CERTIORARI TO THE SUPREME COURT OF FLORIDA

No. 81-5114. Argued March 2, 1982—Decided June 7, 1982

Held: Where the Florida Supreme Court's reversal of petitioner's murder and rape conviction at a jury trial was based on the weight of the evidence, a retrial is not barred by the Double Jeopardy Clause of the Fifth Amendment as made applicable to the States by the Due Process Clause of the Fourteenth Amendment. Pp. 9–17.

(a) A reversal of a conviction based on the weight of the evidence, unlike a reversal based on insufficient evidence where the Double Jeopardy Clause precludes a retrial, *Burks* v. *United States*, 437 U. S. 1; *Greene* v. *Massey*, 437 U. S. 19, does not mean that acquittal was the only proper verdict. Instead, the appellate court sits as a "thirteenth juror" and disagrees with the jury's resolution of the conflicting testimony. Just as a deadlocked jury does not result in an acquittal barring retrial under the Double Jeopardy Clause, an appellate court's disagreement with the jurors' weighing of the evidence does not require the special deference accorded verdicts of acquittal. Moreover, a reversal based on the weight of the evidence can occur only after the State has presented sufficient evidence to support conviction and has persuaded the jury to convict. The reversal simply affords the defendant a second opportunity to seek an acquittal. Giving him this second chance does not amount to governmental oppression of the sort against which the Double Jeopardy Clause was intended to protect. Pp. 9–14.

(b) There is no merit to petitioner's arguments that a distinction between the weight and sufficiency of the evidence is unworkable and will undermine the *Burks* rule by encouraging appellate judges to base reversals on the weight, rather than the sufficiency, of the evidence. Pp. 14–15.

397 So. 2d 1120, affirmed.

O'CONNOR, J., delivered the opinion of the Court, in which BURGER, C. J., and POWELL, REHNQUIST, and STEVENS, JJ., joined. WHITE, J.,

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filed a dissenting opinion, in which BRENNAN, MARSHALL, and BLACKMUN, JJ., joined.

NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D.C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

SUPREME COURT OF THE UNITED STATES

No. 81-5114

DELBERT LEE TIBBS, PETITIONER *v.* FLORIDA

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

[June 7, 1982]

JUSTICE O'CONNOR delivered the opinion of the Court.

We granted certiorari to decide whether the Double Jeopardy Clause[1] bars retrial after a state appellate court sets aside a conviction on the ground that the verdict was against "the weight of the evidence." After examining the policies supporting the Double Jeopardy Clause, we hold that a reversal based on the weight, rather than the sufficiency, of the evidence permits the State to initiate a new prosecution.

I

In 1974, Florida indicted petitioner Delbert Tibbs for the first degree murder of Terry Milroy, the felony murder of Milroy, and the rape of Cynthia Nadeau. Nadeau, the State's chief trial witness, testified that she and Milroy were hitchhiking from St. Petersburg to Marathon, Florida, on February 3, 1974. A man in a green truck picked them up near Fort Myers and, after driving a short way, turned off the highway into a field. He asked Milroy to help him siphon gas from some farm machinery, and Milroy agreed. When Nadeau stepped out of the truck a few minutes later, she discovered the driver holding a gun on Milroy. The driver told Milroy that he wished to have sex with Nadeau, and ordered her to strip. After forcing Nadeau to engage in sodomy, the driver agreed that Milroy could leave. As Milroy started to walk away, however, the assailant shot him in the shoulder. When Milroy fell to the ground, pleading for his life, the gunman walked over and taunted, "Does it hurt, boy? You in pain? Does it hurt, boy?" Record 508. Then, with a shot to the head, he killed Milroy.

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[1] "[N]or shall any person be subject for the same offence to be twice put in jeopardy of life or limb. . . ." U. S. Const., Amdt. 5. The Clause applies to the States through the Due Process Clause of the Fourteenth Amendment. *Benton* v. *Maryland*, 395 U. S. 784 (1969).

This deed finished, the killer raped Nadeau. Fearing for her life, she suggested that they should leave together and that she "would be his old lady." Record 510. The killer seemed to agree and they returned to the highway in the truck. After driving a short distance, he stopped the truck and ordered Nadeau to walk directly in front of it. As soon as her feet hit the ground, however, she ran in the opposite direction. The killer fled with the truck, frightened perhaps by an approaching car. When Nadeau reached a nearby house, the occupants let her in and called the police.

That night, Nadeau gave the police a detailed desciption of the assailant and his truck. Several days later a patrolman stopped Tibbs, who was hitchhiking near Ocala, Florida, because his appearance matched Nadeau's description. The Ocala police department photographed Tibbs and relayed the pictures to the Fort Myers police. When Nadeau examined these photos, she identified Tibbs as the assailant.[2] Nadeau subsequently picked Tibbs out of a lineup and positively identified him at trial as the man who murdered Milroy and raped her.[3]

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[2] The State's witnesses conceded that, at the time of this identification, Nadeau saw only photographs of Tibbs; she did not have the opportunity to pick his picture out of a photographic array. An officer explained, however, that Nadeau had viewed photographs of single suspects on three or four other occasions and had not identified the killer on any of those occasions. Nadeau also had examined several books of photographs without making an identification. We do not pass upon any possible due process questions raised by the State's identification procedures, see generally *Neil* v. *Biggers*, 409 U. S. 188 (1972); *Simmons* v. *United States*, 390 U. S. 377 (1968), because Tibbs' challenge to retrial rests solely upon double

Tibbs' attorney attempted to show that Nadeau was an unreliable witness. She admitted during cross-examination that she had tried "just about all" types of drugs and that she had smoked marijuana shortly before the crimes occurred. Record 526, 545–546. She also evidenced some confusion about the time of day that the assailant had offered her and Milroy a ride. Finally, counsel suggested through questions and closing argument that Nadeau's former boyfriend had killed Milroy and that Nadeau was lying to protect her boyfried. Nadeau flatly denied these suggestions.[4]

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jeopardy grounds.

[3] The State's remaining witnesses included law enforcement agents, a man who had driven Milroy and Nadeau to Fort Myers, the houseowner who had called the police for Nadeau, acquaintances of Milroy, a doctor who had examined Nadeau shortly after the crimes, and the doctor who had performed the autopsy on Milroy. The doctors confirmed that Nadeau had had intercourse on the evening of February 3 and that Milroy had died that evening from a bullet wound in the head. The other witnesses confirmed that Nadeau and Milroy had been hitchhiking through Fort Myers on February 3 and that Nadeau had arrived at a house, in a hysterical condition, that evening.

A Florida prisoner, sentenced to life imprisonment for rape, also testified for the State. This prisoner claimed that he had met Tibbs while Tibbs was in jail awaiting trial and that Tibbs had confessed the crime to him. The defense substantially discredited this witness on cross-examination, revealing inconsistencies in his testimony and suggesting that he had testified in the hope of obtaining leniency from the State.

[4] The results of two polygraph examinations, described in a report read to the jury, indicated that Nadeau was "truthful as to the fact that a black male driving a green pickup truck had picked them up and that this black male had murdered Terry Milroy," Record 302. The polygraphs also suggested that Nadeau was truthful when she identified Tibbs as the assailant. *Id.*, at 303. Tibbs challenged the admissibility of these polygraphs during his first appeal. See *Tibbs* v. *State*, 337 So. 2d 788, 796 (Fla. 1976) (Roberts, J., dissenting). The justices who voted to reverse Tibbs' conviction,

In addition to these attempts to discredit Nadeau, Tibbs testified in his own defense. He explained that he was college educated, that he had published a story and a few poems, and that he was hitchhiking through Florida to learn more about how people live. He claimed that he was in Daytona Beach, across the State from Fort Myers, from the evening of February 1, 1974, through the morning of February 6. He also testified that he did not own a green truck, and that he had not driven any vehicle while in Florida. Finally, he denied committing any of the crimes charged against him.

Two Salvation Army officers partially corroborated Tibbs' story. These officers produced a card signed by Tibbs, indicating that he had slept at the Daytona Beach Salvation Army Transit Lodge on the evening of February 1, 1974. Neither witness, however, had seen Tibbs after the morning of February 2. Tibbs' other witnesses testified to his good reputation as a law-abiding citizen and to his good reputation for veracity.

On rebuttal, the State produced a card, similar to the one introduced by Tibbs, showing that Tibbs had spent the night of February 4 at the Orlando Salvation Army Transit Lodge. This evidence contradicted Tibbs' claim that he had remained in Daytona Beach until February 6, as well as his sworn statements that he had been in Orlando only once, during the early part of January 1974, and that he had not stayed in any Salvation Army lodge after February 1. After the State presented this rebuttal evidence, Tibbs took the stand to deny both that he had been in Orlando on February 4 and that the signature on the Orlando Salvation Army card was his.

The jury convicted Tibbs of first degree murder and rape. Pursuant to the jury's recommendation, the judge sentenced Tibbs to death. On appeal, the Florida Supreme Court reversed. 337 So. 2d 788 (1976) (*Tibbs I*). A plurality of three

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however, did not reach the issue and we express no opinion on this matter of state law.

justices, while acknowledging that "the resolution of factual issues in a criminal trial is peculiarly within the province of a jury," *id.*, at 791, identified six weaknesses in the State's case.[5] First, except for Nadeau's testimony, the State introduced no evidence placing Tibbs in or near Fort Myers on the day of the crimes. Second, although Nadeau gave a detailed description of the assailant's truck, police never found the vehicle. Third, police discovered neither a gun nor car keys in Tibbs' possession. Fourth, Tibbs cooperated fully with the police when he was stopped and arrested. Fifth, the State introduced no evidence casting doubt on Tibbs' veracity.[6] Tibbs, on the other hand, produced witnesses who attested to his good reputation. Finally, several factors undermined Nadeau's believability. Although she asserted at trial that the crimes occurred during daylight, other evidence suggested that the events occurred after nightfall when reliable identification would have been more difficult. Nadeau, furthermore, had smoked marijuana shortly before the crimes and had identified Tibbs during a suggestive photograph session.[7] These weaknesses left the plurality in "considerable doubt that Delbert Tibbs [was] the man who committed the crimes for which he ha[d] been convicted." *Id.*, at 790. Therefore, the plurality concluded that the "interests of justice" required a new trial. *Ibid.*[8]

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[5] The plurality completely discounted the testimony of the convicted rapist who recounted Tibbs' alleged confession. See n. 3, *supra*. This testimony, the justices concluded, appeared "to be the product of purely selfish considerations." 337 So. 2d, at 790.

[6] The plurality opinion summarily dismissed the effect of the rebuttal evidence showing that Tibbs was in Orlando on February 4. A "superficial comparison" of the signature on the Orlando transit card with Tibbs' own signature, the plurality found, supported Tibbs' claim that he had not signed the card. Moreover, evidence that Tibbs was in Orlando on February 4 still did not place him in Fort Myers on February 3. 337 So. 2d, at 790 n. 1.

[7] See n. 2, *supra*.

[8] At the time of Tibbs' first appeal, Florida Appellate Rule 6.16(b) (1962) provided in part:

Justice Boyd concurred specially, noting that "[t]he test to be applied in determining the adequacy of a verdict is whether a jury of reasonable men could have returned that verdict." *Id.*, at 792 (quoting *Griffis* v. *Hill*, 230 So. 2d 143, 145 (Fla. 1969)). Apparently applying that standard, Justice Boyd found the State's evidence deficient. He concluded that "the weakness of the evidence presented in the trial court might well require that [Tibbs] be released from incarceration without further litigation," but "reluctantly concur[red]" in the plurality's decision to order a new trial because he understood Florida law to permit retrial. 337 So. 2d, at 792.[9]

On remand, the trial court dismissed the indictment, concluding that retrial would violate the Double Jeopardy principles articulated in *Burks* v. *United States*, 437 U. S. 1 (1978), and *Greene* v. *Massey*, 437 U. S. 19 (1978).[10] An intermediate appellate court disagreed and remanded the case for trial. 370 So. 2d 386 (Fla. Dist. Ct. App. 1979). The Florida Su-

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"Upon an appeal from the judgment by a defendant who has been sentenced to death the appellate court shall review the evidence to determine if the interests of justice require a new trial, whether the insufficiency of the evidence is a ground of appeal or not."

The substance of this rule has been recodified as Florida Appellate Rule 9.140(f).

[9] At two points, Justice Boyd stated that he "concur[red] in the majority opinion." 337 So. 2d, at 792. However, because we are uncertain what weight Florida attaches to special concurrences of this sort and because Justice Boyd's views differed from those of the other justices voting to reverse, we have chosen to designate the lead opinion a "plurality" opinion.

Three justices dissented from the court's disposition of Tibbs' appeal. They declared that "the evidence in the record before us does not reveal that the ends of justice require that a new trial be awarded," 337 So. 2d, at 796–797, and rejected Tibbs' other assignments of error.

[10] We decided *Burks* and *Greene* after the Florida Supreme Court reversed Tibbs' conviction, but before he could be retried. We have applied *Burks* to prosecutions that were not yet final on the date of that decision. See *Hudson* v. *Louisiana*, 450 U. S. 40 (1981).

preme Court affirmed the latter decision, carefully elaborating the difference between a reversal stemming from insufficient evidence and one prompted by the weight of the evidence. 397 So. 2d 1120 (1981) (per curiam) (*Tibbs II*). As the court explained, a conviction rests upon insufficient evidence when, even after viewing the evidence in the light most favorable to the prosecution, no rational factfinder could have found the defendant guilty beyond a reasonable doubt. A reversal based on the weight of the evidence, on the other hand, draws the appellate court into questions of credibility. The "weight of the evidence" refers to "a determination [by] the trier of fact that a greater amount of credible evidence supports one side of an issue or cause than the other." *Id.*, at 1123.[11]

The Florida Supreme Court then classified *Tibbs I* as a reversal resting on the weight of the evidence. Nadeau's testimony, if believed by the jury, was itself "legally sufficient to support Tibbs' conviction under Florida law." 397 So. 2d, at 1126. In deciding to upset Tibbs' conviction, the court in *Tibbs I* had stressed those "aspects of Nadeau's testimony which cast serious doubt on her believability," *ibid.*, an approach that bespoke a reweighing of the evidence. "Only by stretching the point . . . ," the court concluded in *Tibbs II*, "could we possibly use an 'insufficiency' analysis to characterize our previous reversal of Tibbs' convictions." *Ibid.*[12]

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[11] Other courts similarly have explained the difference between evidentiary weight and evidentiary sufficiency. In *United States* v. *Lincoln*, 630 F. 2d 1313 (CA8 1980), for example, the court declared that:

"The court reviewing the sufficiency of the evidence, whether it be the trial or appellate court, must apply familiar principles. It is required to view the evidence in the light most favorable to the verdict, giving the prosecution the benefit of all inferences reasonably to be drawn in its favor from the evidence. The verdict may be based in whole or in part on circumstantial evidence. The evidence need not exclude every reasonable hypothesis except that of guilt . . . .

. . . . .

"When a motion for new trial is made on the ground that the verdict is contrary to the weight of the evidence, the issues are far different . . . . The district court need not view the evidence in the light most favorable to the verdict; it may weigh the evidence and in so doing evaluate for itself the credibility of the witnesses. If the court concludes that, despite the abstract sufficiency of the evidence to sustain the verdict, the evidence preponderates sufficiently heavily against the verdict that a serious miscarriage of justice may have occurred, it may set aside the verdict, grant a new trial, and submit the issues for determination by another jury." *Id.*, at 1316, 1319.

See generally 2 C. Wright, Federal Practice and Procedure § 553 (1969).

Having found that it could not "fairly conclude . . . that Tibbs' convictions were reversed on the grounds of evidentiary sufficiency," *id.*, at 1127, the Florida Supreme Court held that *Greene* and *Burks* do not bar retrial. Those decisions, the court believed, as well as *United States* v. *DiFrancesco*, 449 U. S. 117 (1980), interpret the Double Jeopardy Clause to preclude retrial after reversal of a conviction only when the appellate court has set the conviction aside on the ground that the evidence was legally insufficient to support conviction. Other reversals, including those based on the weight of the evidence or made in the "interests of justice," do not implicate Double Jeopardy principles.[13]

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[12] Elsewhere in its opinion, the Florida Supreme Court ruled that Florida appellate courts no longer may reverse convictions on the ground that the verdict was against the weight of the evidence. 397 So. 2d, at 1125. This ruling does not diminish the importance of the issue before us. Courts in other jurisdictions sometimes rely upon the weight of the evidence to overturn convictions. For example, some federal courts have interpreted Rule 33 of the Federal Rules of Criminal Procedure, which authorizes a new trial "if required in the interest of justice," to permit the trial judge to set aside a conviction that is against the weight of the evidence. *E. g.*, *United States* v. *Lincoln*, 630 F. 2d 1313, 1319 (CA8 1980); *United States* v. *Indelicato*, 611 F. 2d 376, 387 (CA1 1979); *United States* v. *Turner*, 490 F. Supp. 583, 593 (ED Mich. 1979), affirmance order, 633 F. 2d 219 (CA6 1980), cert. denied, 450 U. S. 912 (1981); *United States* v. *Felice*, 481 F. Supp. 79, 90–91 (ND Ohio 1978).

[13] Three justices dissented from the court's decision to permit Tibbs' retrial. Chief Justice Sundberg suggested that the reversal in *Tibbs I* must have rested upon a finding of evidentiary sufficiency, because the Florida

We granted certiorari to review this interpretation of the Double Jeopardy Clause. 454 U. S. 963 (1981).

II

In 1896, this Court ruled that a criminal defendant who successfully appeals a judgment against him "may be tried anew . . . for the same offence of which he had been convicted." *United States* v. *Ball*, 163 U. S. 662, 672 (1896). This principle, that the Double Jeopardy Clause "imposes no limitations whatever upon the power to *retry* a defendant who has succeeded in getting his first conviction set aside," *North Carolina* v. *Pearce*, 395 U. S. 711, 720 (1969), has persevered to the present. See *United States* v. *DiFrancesco*, *supra*, at 131; *United States* v. *Scott*, 437 U. S. 82, 89–92 (1978). Two considerations support the rule. First, the Court has recognized that society would pay too high a price "were every accused granted immunity from punishment because of any defect sufficient to constitute reversible error in the proceedings leading to conviction." *United States* v. *Tateo*, 377 U. S. 463, 466 (1964). Second, the Court has concluded that retrial after reversal of a conviction is not the type of governmental oppression targeted by the Double Jeopardy Clause. *United States* v. *Scott*, *supra*, at 91. See generally *United States* v. *DiFrancesco*, *supra*, at 131.[14]

Supreme Court lacked authority to reweigh the evidence. He also rejected the majority's distinction between evidentiary weight and evidentiary sufficiency, proposing that the Double Jeopardy Clause should bar retrial whenever an appellate court reverses "for a substantive lack of evidence to support the verdict." 397 So. 2d, at 1128. Justice England merely stated that he would discharge Tibbs "in the interest of justice." *Id.*, at 1130. Justice Boyd concluded that *Tibbs I* had rested on a finding of evidentiary insufficiency and, accordingly, that Tibbs "should be forever discharged from the accusations made against him." *Id.*, at 1131.

[14] The rule also appears to coincide with the intent of the Fifth Amendment's drafters. James Madison's proposed version of the Double Jeopardy Clause provided that "[n]o person shall be subject, except in cases of impeachment, to more than one punishment or one trial for the same offence." 1 Annals of Cong. 434 (1789). Several Representatives objected

Burks v. *United States* and *Greene* v. *Massey* carved a narrow exception from the understanding that a defendant who successfully appeals a conviction is subject to retrial. In those cases, we held that the Double Jeopardy Clause precludes retrial "once the reviewing court has found the evidence legally insufficient" to support conviction. *Burks, supra,* at 18; *Greene, supra,* at 24. This standard, we explained, "means that the government's case was so lacking that it should not have even been *submitted* to the jury." *Burks, supra,* at 16 (emphasis original). A conviction will survive review, we suggested, whenever "the evidence and inferences therefrom most favorable to the prosecution would warrant the jury's finding the defendant guilty beyond a reasonable doubt." *Ibid.* See also *Greene, supra,* at 25. In sum, we noted that the rule barring retrial would be "confined to cases where the prosecution's failure is clear." *Burks, supra,* at 17.

So defined, the exception recognized in *Burks* and *Greene* rests upon two closely related policies. First, the Double Jeopardy Clause attaches special weight to judgments of acquittal.[15] A verdict of not guilty, whether rendered by the

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that this language might prevent a defendant from seeking a new trial after conviction. Representative Sherman, for example, observed that "[i]f the [defendant] was acquitted on the first trial, he ought not to be tried a second time; but if he was convicted on the first, and any thing should appear to set the judgment aside, he was entitled to a second, which was certainly favorable to him." *Id.,* at 753. Madison's supporters explained that the language would not prevent a convicted defendant from seeking a new trial, and the House approved Madison's proposal. *Ibid.* The Senate later substituted the language appearing in the present Clause. S. Jour., 1st Cong., 1st Sess. 71, 77 (1820 ed.). See generally *United States* v. *Wilson,* 420 U. S. 332, 340–342 (1975); Sigler, *A History of Double Jeopardy,* 7 Am. J. Legal Hist. 283, 304–306 (1963).

[15] See *United States* v. *DiFrancesco,* 449 U. S. 117, 129 (1980); *United States* v. *Scott,* 437 U. S. 82, 91 (1978); *Arizona* v. *Washington,* 434 U. S. 497, 503 (1978); *United States* v. *Martin Linen Supply Co.,* 430 U. S. 564, 571 (1977); *Fong Foo* v. *United States,* 369 U. S. 141, 143 (1962) (per

jury or directed by the trial judge, absolutely shields the defendant from retrial.[16] A reversal based on the insufficiency of the evidence has the same effect because it means that no rational factfinder could have voted to convict the defendant.

Second, *Burks* and *Greene* implement the principle that "[t]he Double Jeopardy Clause forbids a second trial for the purpose of affording the prosecution another opportunity to supply evidence which it failed to muster in the first proceeding." *Burks, supra,* at 11. This prohibition, lying at the core of the Clause's protections, prevents the State from honing its trial strategies and perfecting its evidence through successive attempts at conviction. Repeated prosecutorial sallies would unfairly burden the defendant and create a risk of conviction through sheer governmental perseverance. See *Green* v. *United States,* 355 U. S. 184, 187–188 (1957); *United States* v. *DiFrancesco, supra,* at 130. For this reason, when a reversal rests upon the ground that the prosecution has failed to produce sufficient evidence to prove its case, the Double Jeopardy Clause bars the prosecutor from making a second attempt at conviction.

As we suggested just last Term, these policies do not have the same force when a judge disagrees with a jury's resolution of conflicting evidence and concludes that a guilty verdict is against the weight of the evidence. See *Hudson* v. *Louisiana,* 450 U. S. 40, 44–45 n. 5 (1981). A reversal on this ground, unlike a reversal based on insufficient evidence, does not mean that acquittal was the only proper verdict. Instead, the appellate court sits as a "thirteenth juror" and disagrees with the jury's resolution of the conflicting testimony. This difference of opinion no more signifies acquittal than does a disagreement among the jurors themselves. A deadlocked jury, we consistently have recognized, does not result

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curiam).

[16] See, *e. g., United States* v. *Martin Linen Supply Co.,* 430 U. S. 564 (1977); *United States* v. *Ball,* 163 U. S. 662, 666–671 (1896).

in an acquittal barring retrial under the Double Jeopardy Clause.[17] Similarly, an appellate court's disagreement with the jurors' weighing of the evidence does not require the special deference accorded verdicts of acquittal.

A reversal based on the weight of the evidence, moreover, can occur only after the State both has presented sufficient evidence to support conviction and has persuaded the jury to convict. The reversal simply affords the defendant a second opportunity to seek a favorable judgment.[18] An appellate court's decision to give the defendant this second chance does not create "an unacceptably high risk that the Government, with its superior resources, [will] wear down [the] defendant" and obtain conviction solely through its persistence. *United States* v. *DiFrancesco, supra*, at 130.[19]

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[17] See, *e. g., Arizona* v. *Washington*, 434 U. S. 497, 509 (1978); *United States* v. *Sanford*, 429 U. S. 14, 16 (1976) (per curiam); *Johnson* v. *Louisiana*, 406 U. S. 356, 401–402 (1972) (MARSHALL, J., dissenting); *Downum* v. *United States*, 372 U. S. 734, 735–736 (1963); *Wade* v. *Hunter*, 336 U. S. 684, 689 (1949); *Keerl* v. *Montana*, 213 U. S. 135 (1909); *Dreyer* v. *Illinois*, 187 U. S. 71, 84–86 (1902); *Logan* v. *United States*, 144 U. S. 263, 298 (1892); *United States* v. *Perez*, 9 Wheat. 579 (1824).

Our decisions also make clear that disagreements among jurors or judges do not themselves create a reasonable doubt of guilt. As JUSTICE WHITE, writing for the Court in *Johnson* v. *Louisiana*, *supra*, explained, "[t]hat rational men disagree is not in itself equivalent to a failure of proof by the State, nor does it indicate infidelity to the reasonable-doubt standard." 406 U. S., at 362.

[18] The dissent suggests that a reversal based on the weight of the evidence necessarily requires the prosecution to introduce new evidence on retrial. Once an appellate court rules that a conviction is against the weight of the evidence, the dissent reasons, it must reverse any subsequent conviction resting upon the same evidence. We do not believe, however, that jurisdictions endorsing the "weight of the evidence" standard apply that standard equally to successive convictions. In Florida, for example, the highest state court once observed that, although "[t]here is in this State no limit to the number of new trials that may be granted in any case, . . . it takes a strong case to require an appellate court to grant a new trial in a case upon the ground of insufficiency of conflicting evidence to support a verdict when the finding has been made by two juries." *Blocker* v. *State*, 92 Fla. 878, 893, 110 So. 547, 552 (1926) (en banc). The weight of the evidence rule, moreover, often derives from a mandate to act in the interests of justice. See n. 8 and n. 12, *supra*. Although reversal of a first conviction based on sharply conflicting testimony may serve the interests of justice, reversal of a second conviction based on the same evidence

While an appellate ruling based on the weight of the evidence thus fails to implicate the policies supporting *Burks* and *Greene*, it does involve the usual principles permitting retrial after a defendant's successful appeal. Just as the Double Jeopardy Clause does not require society to pay the high price of freeing every defendant whose first trial was tainted by prosecutorial error, it should not exact the price of immunity for every defendant who persuades an appellate panel to overturn an error-free conviction and give him a second chance at acquittal. Giving the defendant this second

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may not. See *United States* v. *Weinstein*, 452 F. 2d 704, 714 n. 14 (CA2 1971) ("We do not join in the . . . forecast that the granting of a new trial would doom the defendant and the Government to an infinite regression. . . . [I]f a third jury were to find [the defendant] guilty, we should suppose any judge would hesitate a long time before concluding that the interests of justice required still another trial"), cert. denied, 406 U. S. 917 (1972). While the interests of justice may require an appellate court to sit once as a thirteenth juror, that standard does not compel the court to repeat the role.

[19] A second chance for the defendant, of course, inevitably affords the prosecutor a second try as well. It is possible that new evidence or advance understanding of the defendant's trial strategy will make the State's case even stronger during a second trial than it was at the first. It is also possible, however, that the passage of time and experience of defense counsel will weaken the prosecutor's presentation. In this case, for example, more than eight years have elapsed since the crimes. Nadeau's ability to recall the events of February 3, 1974, may have diminished significantly, and a jury may be less willing to credit her identification of a man she saw almost a decade ago. When the State has secured one conviction based on legally sufficient evidence, it has everything to lose and little to gain by retrial. Thus, the type of "second chance" that the State receives when a court rests reversal on evidentiary weight does not involve the overreaching prohibited by the Double Jeopardy Clause.

opportunity, when the evidence is sufficient to support the first verdict, hardly amounts to "governmental oppression of the sort against which the Double Jeopardy Clause was intended to protect." *United States* v. *Scott*, 437 U. S. 82, 91 (1978).

Petitioner Tibbs resists these arguments on the grounds that a distinction between the weight and the sufficiency of the evidence is unworkable and that such a distinction will undermine the *Burks* rule by encouraging appellate judges to base reversals on the weight, rather than the sufficiency, of the evidence. We find these arguments unpersuasive for two reasons. First, trial and appellate judges commonly distinguish between the weight and the sufficiency of the evidence.[20] We have no reason to believe that today's decision will erode the demonstrated ability of judges to distinguish legally insufficient evidence from evidence that rationally supports a verdict.

Second, our decision in *Jackson* v. *Virginia*, 443 U. S. 307 (1979), places some restraints on the power of appellate courts to mask reversals based on legally insufficient evidence as reversals grounded on the weight of the evidence. We held in *Jackson* that the Due Process Clause forbids any conviction based on evidence insufficient to persuade a rational factfinder of guilt beyond a reasonable doubt. The Due Process Clause, in other words, sets a lower limit on an appellate court's definition of evidentiary sufficiency.[21] This limit, together with our belief that state appellate judges faithfully honor their obligations to enforce applicable state and federal laws, persuades us that today's ruling will not undermine *Burks*. In sum, we conclude that the Double Jeopardy Clause does not prevent an appellate court from granting a convicted defendant an opportunity to seek acquittal through a new trial.[22]

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[20] See, *e. g.*, *United States* v. *Lincoln*, 630 F. 2d 1313, 1319 (CA8 1980); *United States* v. *Weinstein*, 452 F. 2d 704, 714–716 (CA2 1971), cert. denied, 406 U. S. 917 (1972); *United States* v. *Shipp*, 409 F. 2d 33, 36–37 (CA4), cert. denied, 396 U. S. 864 (1969); *Dorman* v. *State*, 622 P. 2d 448, 453–454 (Alaska 1981); *Ridley* v. *State*, 236 Ga. 147, 149, 223 S. E. 2d 131, 132 (1976); *State* v. *McGranahan*, 415 A. 2d 1298, 1301–1303 (R.I. 1980); *Tyacke* v. *State*, 65 Wis. 2d 513, 521, 223 N. W. 2d 595, 599 (1974).

[21] The evidence in this case clearly satisfied the due process test of *Jackson* v. *Virginia*, *supra*. As we stressed in *Jackson*, the reviewing court must view "the evidence in the light most favorable to the prosecution."

III

We turn, finally, to apply the above principles to the present case. A close reading of *Tibbs I* suggests that the Florida Supreme Court overturned Tibbs' conviction because the evidence, although sufficient to support the jury's verdict, did not fully persuade the court of Tibbs' guilt. The plurality based its review on a Florida rule directing the court in capital cases to "review the evidence to determine if the interests of justice require a new trial, whether the insuf-

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443 U. S., at 319. The trier of fact, not the appellate court, holds "the responsibility . . . fairly to resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts." *Ibid.* In this case, Nadeau provided eyewitness testimony to the crimes. If the jury believed her story, the State's presentation was more than sufficient to satisfy due process.

[22] We note that a contrary rule, one precluding retrial whenever an appellate court rests reversal on evidentiary weight, might prompt state legislatures simply to forbid those courts to reweigh the evidence. Rulemakers willing to permit a new trial in the face of a verdict supported by legally sufficient evidence may be less willing to free completely a defendant convicted by a jury of his peers. Acceptance of Tibbs' double jeopardy theory might also lead to restrictions on the authority of trial judges to order new trials based on their independent assessment of evidentiary weight. Although Tibbs limits his argument to appellate reversals, his contentions logically apply to a trial judge's finding that a conviction was against the weight of the evidence. Cf. *Hudson* v. *Louisiana*, 450 U. S. 40 (1981) (applying *Burks* v. *United States*, 437 U. S. 1 (1978), to trial judge's post-verdict ruling that evidence was insufficient to support conviction). Endorsement of Tibbs' theory, therefore, might only serve to eliminate practices that help shield defendants from unjust convictions.

ficiency of the evidence is a ground of appeal or not." See n. 8, *supra*. References to the "interests of justice" and the justices' own "considerable doubt" of Tibbs' guilt mark the plurality's conclusions.[23] Those conclusions, moreover, stem from the justices' determination that Tibbs' testimony was more reliable than that of Nadeau. This resolution of conflicting testimony in a manner contrary to the jury's verdict is a hallmark of review based on evidentiary weight, not evidentiary sufficiency.

Any ambiguity in *Tibbs I*, finally, was resolved by the Florida Supreme Court in *Tibbs II*. Absent a conflict with the Due Process Clause, see n. 21, *supra*, that court's construction of its prior opinion binds this Court.[24] In *Tibbs II*, of course, the court unequivocably held that *Tibbs I* was "one of those rare instances in which reversal was based on evidentiary weight." 397 So. 2d 1120, 1126 (1981) (per curiam). Thus, we conclude that Tibbs' successful appeal of his conviction rested upon a finding that the conviction was against the

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[23] At one point, the opinion does refer to "evidence which is not sufficient to convince a fair and impartial mind of the guilt of the accused beyond a reasonable doubt." 337 So. 2d, at 791 (quoting *McNeil* v. *State*, 104 Fla. 360, 361–362, 139 So. 791, 792 (1932)). This reference, however, occurs in a lengthy quotation from an earlier Florida decision. When read in context, it does not appear that the plurality actually applied this standard to the evidence in Tibbs' case. Moreover, the quotation containing this sufficiency language also speaks of evidence that is "not satisfactory" to the appellate court and that is not "substantial in character." *Ibid.* This language, in line with the remainder of *Tibbs I*, evidences a weighing of the evidence.

[24] In *Greene* v. *Massey*, 437 U. S. 19 (1978), we recognized that the meaning attached to an ambiguous prior reversal is a matter of state law. In that case, we remanded a double jeopardy issue to the Court of Appeals for the Fifth Circuit, directing the court to consider the effect under state law of several peculiarities in the state court's opinion. *Id.*, at 25–26 & nn. 8–10. We even suggested that the Court of Appeals might "direct further proceedings in the District Court or . . . certify unresolved questions . . . to the Florida Supreme Court" to resolve these problems of state law. *Id.*, at 27.

weight of the evidence, not upon a holding that the evidence was legally insufficient to support the verdict. Under these circumstances, the Double Jeopardy Clause does not bar retrial. Accordingly, the judgment of the Florida Supreme Court is

Affirmed.

weight to the evidence, while acknowledging that the evidence was legally sufficient to support the verdict. Under these circumstances, the Double Jeopardy Clause does not bar retrial. Accordingly, the judgment of the Florida Supreme Court is

Affirmed.

SUPREME COURT OF THE UNITED STATES

No. 81-5114

DELBERT LEE TIBBS, PETITIONER *v.* FLORIDA

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

[June 7, 1982]

JUSTICE WHITE, with whom JUSTICE BRENNAN, JUSTICE MARSHALL, and JUSTICE BLACKMUN join, dissenting.

As our cases in this area indicate, the meaning of the Double Jeopardy Clause is not always readily apparent. See, *e. g., United States* v. *Burks*, 437 U. S. 1 (1978) (overruling *Bryan* v. *United States*, 338 U. S. 552 (1938); *Sapir* v. *United States*, 348 U. S. 373 (1955); *Forman* v. *United States*, 361 U. S. 416 (1960)); *United States* v. *Scott*, 437 U. S. 82 (1978) (overruling *United States* v. *Jenkins*, 420 U. S. 358 (1975)). For this reason, we should begin with a clear understanding of what is at stake in this case.

To sustain the conviction, in this case, the prosecution was required to convince the Florida Supreme Court not only that the evidence was sufficient under the federal constitutional standard announced in *Jackson* v. *Virginia*, 443 U. S. 307 (1979), but also that as a matter of state law, the verdict was not against the weight of the evidence. The Florida Supreme Court found the verdict to be against the weight of the evidence, thus holding that as a matter of state law the prosecution failed to present evidence adequate to sustain the conviction. Were the state to present this same evidence again, we must assume that once again the state courts would reverse any conviction that was based upon it.* The state was not prevented from presenting its best case because of some incorrect procedural ruling by the trial court; rather, the state had a full opportunity to present its case, but that case was not adequate as a matter of state law. If the state presents no new evidence, the defendant has no new or additional burden to meet in successfully presenting a defense: He may stand on, *i. e.*, repeat, what he has already presented. Thus, the only point of any second trial in this case is to allow the state to present additional evidence to bolster its case. If it does not have such evidence, reprosecution can serve no purpose other than harassment. The majority holds that reprosecution under these circumstances does not offend the Double Jeopardy provision of the Constitution. I do not agree.

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*Only Chief Judge Sundberg, concurring in part and dissenting in part, reached this issue below: "Since the same evidence must be used, an appellate court would have no choice but once again to reverse a conviction be-

The majority concedes, as it must under *Burks*, *supra*, that if the state's evidence failed to meet the federal due process standard of evidentiary sufficiency, the Double Jeopardy Clause would bar reprosecution. The majority fails to explain why the State should be allowed another try where its proof has been held inadequate on state law grounds, when it could not do so were it inadequate on federal law grounds. In both cases the state has failed to present evidence adequate to sustain the conviction. The interests of the State in overcoming the evidentiary insufficiencies of its case would seem to be exactly the same in the two cases; the interests of the defendant in avoiding a second trial would also seem to be exactly the same in each case. Yet the ma-

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cause of our reversal under identical circumstances." J.A. 29–30. Because the majority concluded that it would not in the future reverse convictions on grounds of evidentiary weight, it is not clear whether that court, were it presented with the exact same evidence in a *Tibbs III*, would follow its new rule and affirm or again reverse on "law of the case" grounds. I agree with the majority, however, that the peculiar procedural posture of this case does not affect our consideration of the issue because other jurisdictions, including the federal government, make use of a similar rule with respect to evidentiary weight.

jority holds that the Double Jeopardy Clause leads to different results in the two instances.

The majority offers two arguments in its attempt to distinguish the two cases. First, it emphasizes that the Double Jeopardy Clause "attaches special weight to judgments of acquittal." But in neither of the situations posited has there been a judgment of acquittal by the initial factfinder. In each instance, a reviewing court decides that, as a matter of law, the decision of the factfinder cannot stand. Second, the majority thinks it to be of some significance that when the evidence is determined to be insufficient as a matter of federal law, then no rational factfinder could have voted to convict on that basis. On the other hand, when the conviction is reversed on the basis of the state-law rule applying a "weight of the evidence" test, that "does not mean that acquittal was the only proper verdict." *Ante*, at 12. The constraints of the Double Jeopardy Clause, however, do not depend upon a determination that an "acquittal was the only proper verdict." The fact remains that the state failed to prove the defendant guilty in accordance with the evidentiary requirements of state law.

The majority opinion rests finally on a mischaracterization of the appellate court's ruling: "The reversal simply affords the defendant a second opportunity to seek a favorable judgment." *Ibid.* But as I described above, it is not the defendant who has the burden of coming up with a new case on retrial; it is the prosecution. The defendant has already demonstrated that a conviction based on the state's case, as so far developed, is "against the weight of the evidence."

Having concluded that the majority opinion fails to justify the distinction it draws, I too turn to "the policies supporting the Double Jeopardy Clause," *ante*, at 1, to determine whether this distinction is relevant. I do not believe it necessary to look beyond the articulation of those policies in the majority opinion itself to conclude that it is not:

> "*Burks* and *Greene* implement the principle that '[t]he Double Jeopardy Clause forbids a second trial for the purpose of affording the prosecution another opportunity to supply evidence which it failed to muster in the first proceeding.' This prohibition, lying at the core of the Clause's protections, prevents the State from honing its trial strategies and perfecting its evidence through successive attempts at conviction. Repeated prosecutorial sallies would unfairly burden the defendant and create a risk of conviction through sheer governmental perseverance." *Ante*, at 11 (citations omitted).

These same policy considerations are at stake when a conviction is reversed on state law grounds going to the adequacy of the evidence. The relevant question is whether the reversal is "'due to a failure of proof at trial' where the State received a 'fair opportunity to offer whatever proof it could assemble.'" *Hudson* v. *Louisiana*, 450 U. S. 40, 43 (1981) (quoting *Burks*). That the proof fails on state law, rather than federal law, grounds is immaterial to these policy considerations. Thus, the relevant distinction is between reversals based on evidentiary grounds and those based on procedural grounds: Only in the latter case can the state proceed to retrial without offending the deeply ingrained principle that "the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense." *Green* v. *United States*, 355 U. S. 184, 187 (1957).

It must also be noted that judges having doubts about the sufficiency of the evidence under the *Jackson* standard may prefer to reverse on the weight of the evidence, since retrial would not be barred. If done recurringly, this would undermine *Jackson*, *Burks* and *Green*. But under *Burks* and *Greene*, retrial is foreclosed by the Double Jeopardy Clause if the evidence fails to satisfy the *Jackson* standard. Hence, the *Jackson* issue cannot be avoided; if retrial is to be had, the evidence must be found to be legally sufficient, as a matter of federal law, to sustain the jury verdict. That finding must accompany any reversal based on the weight of the evidence if retrial is contemplated. The upshot may be that appellate judges will not be inclined to proclaim the evidence in a case to be legally sufficient, yet go on to disagree with the jury and the trial court by reversing on weight-of-the-evidence grounds. Indeed, in this case, the Florida Supreme Court declared that prospect to be an anomaly and a mistake and proclaimed that it would never again put itself in this position.

With all due respect, I dissent.

All issues available have been filmed.
Unfortunately, any scattered missing issues are no longer available.

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981/81-5152

(Slip Opinion)

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Lumber Co.*, 200 U. S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

TAYLOR *v.* ALABAMA

CERTIORARI TO THE SUPREME COURT OF ALABAMA

No. 81-5152. Argued March 23, 1982—Decided June 23, 1982

Petitioner was arrested on a grocery store robbery charge without a warrant or probable cause, based on an uncorroborated informant's tip, and was taken to the police station, where he was given *Miranda* warnings, fingerprinted, questioned, and placed in a lineup. After being told that his fingerprints matched those on grocery items handled by one of the participants in the robbery and after a short visit with his girlfriend, petitioner signed a written confession. Over petitioner's objection, the confession was admitted into evidence at his trial in an Alabama state court, and he was convicted. The Alabama Court of Criminal Appeals reversed, holding that the confession should not have been admitted, but was in turn reversed by the Alabama Supreme Court.

Held: Petitioner's confession should have been suppressed as the fruit of an illegal arrest. *Brown* v. *Illinois*, 422 U. S. 590; *Dunaway* v. *New York*, 442 U. S. 200. Pp. 2–6.

(a) A confession obtained through custodial interrogation after an illegal arrest should be excluded unless intervening events break the causal connection between the arrest and the confession so that the confession is sufficiently an act of free will to purge the primary taint. Pp. 2–3.

(b) Here, there was no meaningful intervening event. The illegality of the initial arrest was not cured by the facts that six hours elapsed between the arrest and confession; that the confession may have been "voluntary" for Fifth Amendment purposes because *Miranda* warnings were given; that petitioner was permitted a short visit with his girlfriend; or that the police did not physically abuse petitioner. Nor was the fact that an arrest warrant, based on a comparison of fingerprints, was filed after petitioner had been arrested and while he was being interrogated a significant intervening event, such warrant being irrelevant to whether the confession was the fruit of an illegal arrest. The initial fingerprints, which were themselves the fruit of the illegal arrest and were used to

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extract the confession, cannot be deemed sufficient "attenuation" to break the connection between the illegal arrest and the confession merely because they formed the basis for the arrest warrant. Pp. 3–6.

399 So. 2d 881, reversed and remanded.

MARSHALL, J., delivered the opinion of the Court, in which BRENNAN, WHITE, BLACKMUN, and STEVENS, JJ., joined. O'CONNOR, J., filed a dissenting opinion. in which BURGER, C. J., and POWELL, and REHNQUIST, JJ., joined.

NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D.C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

SUPREME COURT OF THE UNITED STATES

No. 81-5152

OMAR TAYLOR, PETITIONER *v.* ALABAMA

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF ALABAMA

[June 23, 1982]

JUSTICE MARSHALL delivered the Opinion of the Court.

This case presents the narrow question whether petitioner's confession should have been suppressed as the fruit of an illegal arrest. The Supreme Court of Alabama held that the evidence was properly admitted. Because the decision below is inconsistent with our decisions in *Dunaway* v. *New York*, 442 U. S. 200 (1979), and *Brown* v. *Illinois*, 422 U. S. 590 (1975), we reverse.

I

In 1978, a grocery store in Montgomery, Alabama was robbed. There had been a number of robberies in this area, and the police had initiated an intensive manhunt in an effort to apprehend the robbers. An individual who was at that time incarcerated on unrelated charges told a police officer that "he had heard that [petitioner] Omar Taylor was involved in the robbery." App. 4. This individual had never before given similar information to this officer, did not tell the officer where he had heard this information, and did not provide any details of the crime. This tip was insufficient to give the police probable cause to obtain a warrant or to arrest petitioner.

Nonetheless, on the basis of this information, two officers arrested petitioner without a warrant. They told petitioner that he was being arrested in connection with the grocery-store robbery, searched him, and took him to the station for questioning. Petitioner was given the warnings required by *Miranda* v. *Arizona*, 384 U. S. 436 (1966). At the station, he was fingerprinted, re-advised of his *Miranda* rights, questioned, and placed in a line-up. The victims of the robbery were unable to identify him in the line-up. The police told petitioner that his fingerprints matched those on some grocery items that had been handled by one of the participants in the robbery. After a short visit with his girlfriend and a male companion, petitioner signed a waiver-of-rights form and executed a written confession. The form and the signed confession were admitted into evidence.

Petitioner objected to the admission of this evidence at his trial. He argued that his warrantless arrest was not supported by probable cause, that he had been involuntarily transported to the police station, and that the confession must be suppressed as the fruit of this illegal arrest. The trial court overruled this objection, and petitioner was convicted. On appeal, the Alabama Court of Criminal Appeals reversed, holding that the facts of this case are virtually indistinguishable from those presented to this Court in *Dunaway* v. *New York*, *supra*, and that the confession should not have been admitted into evidence. The Alabama Supreme Court reversed the court of appeals.

II

In *Brown* v. *Illinois*, *supra*, and *Dunaway* v. *New York*, *supra*, the police arrested suspects without probable cause. The suspects were transported to police headquarters, advised of their *Miranda* rights, and interrogated. They confessed within two hours of their arrest. This Court held that the confessions were not admissible at trial, reasoning that a confession obtained through custodial interrogation after an illegal arrest should be excluded unless intervening events break the causal connection between the illegal arrest and the confession so that the confession is "'sufficiently an act of free will to purge the primary taint.'" *Brown* v. *Illinois*, 422 U. S., at 602 (quoting *Wong Sun* v. *United States*, 371 U. S. 471, 486 (1963)). See also *Dunaway* v. *New York*, 442 U. S., at 217. This Court identified several factors that should be considered in determining whether a confession has been purged of the taint of the illegal arrest: "the temporal proximity of the arrest and the confession, the presence of intervening circumstances, . . . and, particularly, the purpose and flagrancy of the official misconduct." *Brown* v. *Illinois*, 422 U. S., at 603–604 (citations omitted); *Dunaway* v. *New York*, 442 U. S., at 218. The State bears the burden of proving that a confession is admissible. *Ibid.*

In *Brown* and *Dunaway*, this Court firmly established that the fact that the confession may be "voluntary" for purposes of the Fifth Amendment, in the sense that *Miranda* warnings were given and understood, is not by itself sufficient to purge the taint of the illegal arrest. In this situation, a finding of "voluntariness" for purposes of the Fifth Amendment is merely a threshold requirement for Fourth Amendment analysis. See *Dunaway* v. *New York*, 442 U. S., at 217. The reason for this approach is clear: "[t]he exclusionary rule, . . . when utilized to effectuate the Fourth Amendment, serves interests and policies that are distinct from those it serves under the Fifth" Amendment. *Brown* v. *Illinois*, 422 U. S., at 601. If *Miranda* warnings were viewed as a talisman that cured all Fourth Amendment violations, then the constitutional guarantee against unlawful searches and seizures would be reduced to a mere "'form of words.'" *Id.*, at 603 (quoting *Mapp* v. *Ohio*, 367 U. S. 643, 648 (1961)).

This case is a virtual replica of both *Brown* and *Dunaway*. Petitioner was arrested without probable cause in the hope that something would turn up, and he confessed shortly thereafter without any meaningful intervening event. The State's arguments to the contrary are unpersuasive. The State begins by focusing on the temporal proximity of the arrest and the confession. It observes that the length of time between the illegal arrest and the confession was six hours in this case, while in *Brown* and *Dunaway* the incriminating statements were obtained within two hours. However, a difference of a few hours is not significant where, as here, petitioner was in police custody, unrepresented by counsel, and he was questioned on several occasions, fingerprinted, and subjected to a line-up. The State has not even demonstrated the amount of this time that was spent in interrogation, arguing only that petitioner "had every opportunity to consider his situation, to organize his thoughts, to contemplate his constitutional rights, and to exercise his free will." Brief for Respondent 11.

The State points to several intervening events that it argues are sufficient to break the connection between the illegal arrest and petitioner's confession. It observes that petitioner was given *Miranda* warnings three times. As our foregoing discussion of *Brown* and *Dunaway* demonstrates, however, the State's reliance on the giving of *Miranda* warnings is misplaced. The State also observes that petitioner visited with his girlfriend and a male companion before he confessed. This claim fares no better. According to the officer and petitioner, these two visitors were outside the interrogation room where petitioner was being questioned. After petitioner signed a waiver-of-rights form, he was allowed to meet with these visitors. The State fails to explain how this five to ten minute visit, after which petitioner immediately recanted his former statements that he knew nothing about the robbery and signed the confession, could possibly have contributed to his ability to consider carefully and objectively his options and to exercise his free will. This suggestion is particularly dubious in light of petitioner's uncontroverted testimony that his girlfriend was emotionally upset at the time of this visit.[1] If any inference could be drawn, it would be that this visit had just the opposite effect.

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[1] According to petitioner, his girlfriend became upset upon hearing the officer advise petitioner to cooperate. App. 16. Contrary to the allega-

The State points to an arrest warrant filed after petitioner had been arrested and while he was being interrogated as another significant "intervening event." While petitioner was in custody, the police determined that the fingerprints on some grocery items matched those that they had taken from petitioner immediately after his arrest. Based on this comparison, an arrest warrant was filed. The filing of this warrant, however, is irrelevant to whether the confession was the fruit of the illegal arrest. This case is not like *Johnson* v. *Lousiana*, 406 U. S. 356 (1972), where the defendant was brought before a committing magistrate who advised him of his rights and set bail. Here, the arrest warrant was filed *ex parte*, based on the comparison of the fingerprints found at the scene of the crime and petitioner's fingerprints, which had been taken immediately after his arrest. The initial fingerprints, which were themselves the fruit of petitioner's illegal arrest, see *Davis* v. *Mississippi*, 394 U. S. 721 (1969), and which were used to extract the confession from petitioner, cannot be deemed sufficient "attenuation" to break the connection between the illegal arrest and the confession merely because they also formed the basis for an arrest warrant that was filed while petitioner was being interrogated.[2]

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tions in the dissent, at no point did the officer contradict petitioner's version of his girlfriend's emotional state or petitioner's statement that his girlfriend was present at the time the officer advised him to cooperate. In fact, the testimony from both petitioner and the officer with respect to this visit are consistent. The officer testified only that he advised petitioner to cooperate between the time petitioner signed a rights form at the commencement of this interrogation period and the time that petitioner signed the statement of confession. Tr. 31, 136–137. He also testified that during this same interval, he allowed the short visit between petitioner and his girlfriend. *Ibid.* The District Court made no findings of fact with respect to these incidents. In any event, even assuming the accuracy of the dissent's version of the facts, compare *post*, at 2 with Tr. 31, 136–137, the dissent offers no explanation for its conclusion that this five to ten minute visit should be viewed as an intervening event that purges the taint of the illegal arrest.

[2] Petitioner also raises an ambiguous objection to the admission of fingerprint evidence at his trial. The trial court granted petitioner's motion

Finally, the State argues that the police conduct here was not flagrant or purposeful, and that we should not follow our decisions in *Brown* and *Dunaway* for that reason. However, we fail to see any relevant distinction between the conduct here and that in *Dunaway*. In this case, as in *Dunaway*, the police effectuated an investigatory arrest without probable cause, based on an uncorroborated informant's tip, and involuntarily transported petitioner to the station for interrogation in the hope that something would turn up. The fact that the police did not physically abuse petitioner, or that the confession they obtained may have been "voluntary" for purposes of the Fifth Amendment, does not cure the illegality of the initial arrest. Alternatively, the State contends that the police conduct here argues for adopting a "good faith" exception to the exclusionary rule. To date, we have not recognized such an exception, and we decline to do so here.

III

In sum, petitioner's confession was the fruit of his illegal arrest. Under our decisions in *Brown* v. *Illinois*, and *Dunaway* v. *New York*, the confession clearly should not have been admitted at his trial. Accordingly, we reverse the decision of the Alabama Supreme Court and remand this case for further proceedings not inconsistent with this opinion.

It is so ordered.

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to suppress the initial fingerprints as the fruit of his illegal arrest under *Davis* v. *Mississippi*, 394 U. S. 721 (1969), and granted the State's motion to take petitioner's fingerprints at trial. The nature of petitioner's objection to the admission of any fingerprint evidence at trial is unclear, and it is also uncertain whether an objection to the procedure used for taking the second set of fingerprints has been properly preserved for our review. In any event, we need not reach this issue because we reverse the decision on the ground that the confession should not have been admitted. To the extent that petitioner still may challenge the fingerprinting procedure employed below, the state courts should be given the opportunity to address this challenge in the first instance.

SUPREME COURT OF THE UNITED STATES

No. 81–5152

OMAR TAYLOR, PETITIONER *v.* ALABAMA

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF ALABAMA

[June 23, 1982]

JUSTICE O'CONNOR, with whom THE CHIEF JUSTICE, JUSTICE POWELL, and JUSTICE REHNQUIST join, dissenting.

The Court holds today that Omar Taylor's detailed confession was the fruit of an illegal arrest, and consequently, should be suppressed. Because I conclude that neither the facts nor the law supports the Court's analysis, I respectfully dissent.

I

In the course of their investigation of the Moseley robbery, Montgomery police questioned Charles Martin, who was being held on unrelated rape and robbery charges. Martin stated that "he had heard that Omar Taylor was involved in the robbery of Moseley's Grocery," Transcript (Tr.) 6, but the police made no attempt to establish either Martin's credibility as an informant or the reliability of the information he provided.[1]

Based only on this tip, which did not provide probable cause, Sergeants Alford and Rutland arrested Taylor a little before 3:00 p.m. on January 4, 1979. At that time, they told him why he was being arrested and advised him of his *Miranda* rights, but asked him no questions regarding the robbery. Tr. 20, 24. When they arrived at the police station, the officers turned Taylor over to detectives.

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[1] The police, however, suspected Martin of complicity in the Moseley robbery, Tr. 15. It later developed that Martin had instigated, planned, and participated in the robbery.

After Taylor had been fingerprinted and signed a form acknowledging his *Miranda* rights, Detective Wilson questioned him for about fifteen minutes, Tr. 48, and placed him in a lineup before one of the victims, Mrs. Moseley. Tr. 37–38. At the lineup, which lasted about an hour, Tr. 48, Mrs. Moseley was unable to identify the petitioner. Following the lineup, Detective Wilson told Taylor that his fingerprints matched the fingerprints removed from grocery items handled by one of the robbers. Nevertheless, the petitioner denied knowledge of the robbery.

Toward 9:00 p.m. that evening, Detective Hicks readvised Taylor of his *Miranda* rights, Tr. 25, and Taylor once again read and signed a form setting forth his *Miranda* rights. Tr. 28, 125. At no time did Taylor ask for a lawyer or indicate that he did not want to talk to police. Tr. 28–29, 35, 40. During his five to ten minute interview with Taylor, Detective Hicks confronted him with the fingerprint evidence. Tr. 36. Hicks urged the petitioner to cooperate with the police, but carefully refrained from making him any promises, stating that at most he could inform the judge of the petitioner's cooperation. Tr. 31, 34. Taylor continued to deny involvement in the robbery. Tr. 35–36.

Following this conversation, both the petitioner's girlfriend and his neighbor came to the police station and requested to speak with him. When Taylor indicated that he wanted to speak with his friends, Detective Hicks left them alone in his office for several minutes.[2] After that meeting, the petitioner confessed to the crime, and signed a detailed written confession.[3]

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[2] The Court's rather different account of this meeting apparently stems from a decision to accept the testimony most favorable to the holding it wants to reach. That decision, however, runs counter to the longstanding practice of federal appellate courts to uphold the denial of the motion to suppress if, in the absence of any express findings by the District Court, there is any reasonable view of the evidence to support it. See *United States* v. *Payton*, 615 F. 2d 922, 923 (CA1), cert. denied, 446 U. S. 969 (1980); *United States* v. *Vicknair*, 610 F. 2d 372, 376, n. 4 (CA5), cert. denied, 449 U. S. 823 (1980). In the present case, the officer testified that

Before trial, the petitioner moved to suppress his confession, arguing that it was the product of an illegal arrest, and that it had been obtained in violation of his Fifth and Sixth

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Taylor's "girlfriend came to us and said she wanted to talk to Omar, and we told Omar she was outside and he wanted to talk to her. And at that time, we let him talk to her." Tr. 35. Detective Hicks specifically denied that he had urged Taylor to talk to his girlfriend. Tr. 35, 133–134. The detective acknowledged that he had told the petitioner that he could inform the judge of the petitioner's cooperation, but he expressly denied making any other statements to Taylor or his girlfriend about "cooperation." Tr. 31, 134.

The petitioner, of course, had a vastly different version. He testified that the police had brought his girlfriend into the room and told him, in her presence, that he was facing 10 years to life in prison, but that if he cooperated they might be able to arrange a suspended sentence or probation. Upon hearing that remark, the petitioner's girlfriend became upset and began to cry, at which point the police left the petitioner alone with his friends. Tr. 52. As we noted above, the police expressly denied making any such statements. More importantly, upon comparing the two versions, it becomes clear that in an effort to support its holding, the Court has parsed through the petitioner's story and plucked those tidbits that the police did not expressly contradict. This method of setting forth the facts of a case on appellate review hardly comports with the rule that an appellate court must adopt any reasonable view of the evidence that supports the trial court's ruling.

Since there is nothing unreasonable about the police account of the meeting between the petitioner and his friends, that version is the one we must accept on review. At the hearing, Detective Hicks testified that after Taylor asked to speak with his friends, the police left them alone together. There is no suggestion, other than the petitioner's discredited version of the meeting, that the police said anything to the petitioner's girlfriend, or that she became upset. Thus, the Court errs in stating that the petitioner's girlfriend became upset because of statements made by the police, and in intimating that the police created a coercive atmosphere in which the petitioner could not carefully consider his options and, on the basis of his friends' advice, decide to confess to the robbery.

[3] In that confession, the petitioner stated that Charles Martin approached him with guns and a plan to rob Moseley's Grocery. Taylor's

Amendment rights. The trial judge assumed that the arrest was illegal,[4] but found that the confession was voluntary, consistent with the Fifth and Sixth Amendments, and that "there were enough intervening factors between the arrest and confession" to overcome the taint of the illegal arrest. Tr. 116. Accordingly, he admitted the confession.

II

Although the Court misapprehends the facts of the present case, it has stated correctly the controlling substantive law. In the Court's words, "a confession obtained through custodial interrogation after an illegal arrest should be excluded unless intervening events break the causal connection between the illegal arrest and the confession so that the confession is 'sufficiently an act of free will to purge the primary taint.'" *Ante*, at 2–3 (quoting *Brown* v. *Illinois*, 422 U. S. 590, 602 (1975)).

In *Brown*, this Court emphasized that "*Miranda* warnings are an important factor . . . in determining whether the confession [was] obtained by exploitation of an illegal arrest." 422 U. S., at 603.[5] The Court did not discount the signifi-

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role in the robbery was to distract Mr. Moseley by buying some groceries. Just before his accomplices pulled out their guns, Taylor put down the groceries and walked outside to see whether an approaching car was a police car. When he saw that it was not a police car, he began to reenter the store, but stopped when he saw the robbery taking place. Thereafter he fled, met his co-felons at a preassigned place, and took his share of the money. Tr. 128–132.

[4] In fact, the State did not seriously contend that the arrest had been based on probable cause. See Tr. 8, 10.

[5] The holding in *Brown* was derived from this this Court's seminal decision in *Wong Sun* v. *United States*, 371 U. S. 471 (1963), in which we rejected a "but for" test for determining whether to suppress evidence gathered following a Fourth Amendment violation.

"We need not hold that all evidence is 'fruit of the poisonous tree' simply because it would not have come to light but for the illegal actions of the police. Rather, the more apt question in such a case is 'whether, granting cance of other factors, however, noting that "*Miranda* warnings, *alone* and *per se*, cannot always make the act sufficiently a product of free will to break, for Fourth Amendment purposes, the causal connection between the illegality and the confession." *Ibid.* *Brown* holds, therefore, that not only *Miranda* warnings, but also "[t]he temporal proximity of the arrest and the confession, the presence of intervening circumstances, and, particularly, the purpose and flagrancy of the official misconduct are all relevant." *Id.*, at 603–604 (footnotes and citations omitted).

In light of those factors, the *Brown* Court reviewed the record and found that "Brown's first statement was separated from his illegal arrest by less than two hours, and [that] there was no intervening event of significance whatsoever." *Id.*, at 604. Moreover, the police conduct in arresting Brown was particularly egregious. The "impropriety of the arrest was obvious," and the "manner in which Brown's arrest was effected gives the appearance of having been calculated to cause surprise, fright, and confusion." *Id.*, at 605. The Court held that as a consequence the confession should have been suppressed.

Four Terms later, in *Dunaway* v. *New York*, 442 U. S. 200, 204 (1979), this Court reaffirmed the *Brown* rule that in order to use at trial statements obtained following an arrest on less than probable cause,

> "the prosecution must show not only that the statements meet the Fifth Amendment voluntariness standard, but also that the causal connection between the statements and the illegal arrest is broken sufficiently to purge the primary taint of the illegal arrest."

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establishment of the primary illegality, the evidence to which instant objection is made has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint.' Maguire, Evidence of Guilt, 221 (1959)." *Id.*, at 487–488.

Finding the facts in *Dunaway* to be "virtually a replica of the situation in *Brown*," *id.*, at 218, the Court held that the petitioner's confession should have been suppressed. Critical to the Court's holding was its observation that the petitioner "confessed without any intervening event of significance." *Ibid.* See *id.*, at 219 ("No intervening events broke the connection between petitioner's illegal detention and his confession").

III

Our task is to apply the law as articulated in *Brown* and *Dunaway* to the facts of this case.

The first significant consideration is that following his unlawful arrest, Taylor was warned on three separate occasions that he

> "had a right to remain silent, [and] anything he said could be used against him in a court of law[;] he had the right to have an attorney present, [and] if he could not afford one, the State would appoint one for him[;] he could answer questions but he could stop answering at any time." Tr. 23.

Under *Brown* and *Dunaway*, these warnings must be counted as "an important factor . . . in determining whether the confession [was] obtained by exploitation of an illegal arrest," *Brown* v. *Illinois*, *supra*, at 603, though they are, standing alone, insufficient to prove that the primary taint of an illegal arrest had been purged.

Second, in contrast to the facts in *Brown*, the facts in the present case show that the petitioner was not subjected to intimidating police misconduct. In *Brown*, police had broken into the petitioner's house and searched it. When the petitioner later came home, two officers pointed their guns at him and arrested him, leading the Court to conclude that "the manner in which [the petitioner's] arrest was effected gives the appearance of having been calculated to cause surprise, fright, and confusion." *Id.*, at 605. By contrast, nothing in the record before us indicates that the petitioner's arrest was violent, or designed to "cause surprise, fright, and confusion." Instead, Montgomery officers approached Taylor, asked him his name, and told him that he was under arrest for the Moseley robbery. They then searched him, advised him of his rights, and took him to the police station.

Third, while in both *Brown* and *Dunaway* there was "no intervening event of significance whatsoever," 422 U. S., at 604, in the present case Taylor's girlfriend and neighbor came to the police station and asked to speak with him. Before meeting with his two friends, the petitioner steadfastly had denied involvement in the Moseley robbery. Immediately following the meeting, the petitioner gave a complete and detailed confession of his participation in the armed robbery. This meeting between the petitioner and his two friends, as described by the police in their testimony at the suppression hearing, plainly constituted an intervening circumstance.

Finally, the record reveals that the petitioner spent most of the time between his arrest and confession by himself.[6] In *Dunaway* and *Brown*, by contrast, the defendants were interrogated continuously before they made incriminating statements.

In sum, when these four factors are considered together,[7] it is obvious that there is no sufficient basis on which to overturn the trial court's finding that "there were enough intervening factors" to overcome the taint of the illegal arrest. In fact, I believe it is clear that the State carried its burden of proof. The petitioner was warned of his rights to remain silent and to have a lawyer present, and there is no dispute that he understood those rights or that he waived them voluntarily and without coercion. After receiving three sets of such warnings, he met with his girlfriend and neighbor, *at his request.* Following that meeting, at which no police officers were present, the petitioner decided to confess to his participation in the robbery. The petitioner's confession was not proximately caused by his illegal arrest, but was the product of a decision based both on knowledge of his constitutional rights and on the discussion with his friends. Accordingly, I respectfully dissent.

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[6] The petitioner confessed some six hours after his arrest. As JUSTICE STEVENS noted in his concurring opinion in *Dunaway*, the "temporal relationship between the arrest and the confession may be an ambiguous factor," 442 U. S., at 220, for a lengthy detention could be used to exploit an illegal arrest at least as easily as a brief detention. In the present case, there seems to be nothing remarkable, one way or the other, about the length of detention.

[7] The Court has taken each circumstance out of context and examined it to see whether it alone would be enough to purge the taint of the illegal arrest. The Court's failure to consider the circumstances of this case as a whole may have contributed to its erroneous conclusion.

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(Slip Opinion)

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Lumber Co.*, 200 U. S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

ENMUND v. FLORIDA

CERTIORARI TO THE SUPREME COURT OF FLORIDA

No. 81-5321. Argued March 23, 1982—Decided July 2, 1982

Petitioner and a codefendant, at a jury trial in a Florida court, were convicted of first-degree murder and robbery of two elderly persons at their farmhouse, and were sentenced to death. The Florida Supreme Court affirmed. The court held that, although the record supported no more than the inference that petitioner was the person in a car parked by the side of the road near the farmhouse at the time of the killings waiting to help the robbers and killers (the codefendant and another) escape, this was enough under Florida law to make petitioner a constructive aider and abettor and hence a principal in first-degree murder upon whom the death penalty could be imposed. It was thus irrelevant to petitioner's challenge to the death sentence that he did not himself kill and was not present at the killings, or whether he intended that the victims be killed or anticipated that lethal force might be used to effectuate the robbery or escape.

Held: The imposition of the death penalty upon petitioner is inconsistent with the Eighth and Fourteenth Amendments. Pp. 5–19.

(a) The current judgments of legislatures, juries, and prosecutors weigh heavily on the side of rejecting capital punishment for the crime at issue. Only a small minority of States—nine—allow the death penalty to be imposed solely because the defendant somehow participated in the robbery in the course of which a murder was committed, but did not take or attempt or intend to take life, or intend that lethal force be employed. And the evidence is overwhelming that American juries have repudiated imposition of the death penalty for crimes such as petitioner's, the statistics demonstrating that juries—and perhaps prosecutors—consider death a disproportionate penalty for those who fall within petitioner's category. Pp. 6–14.

(b) While robbery is a serious crime deserving serious punishment, it is not a crime "so grievous an affront to humanity that the only adequate

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response may be the penalty of death." *Gregg* v. *Georgia*, 428 U. S. 153, 184. The death penalty, which is "unique in its severity and irrevocability," *id.*, at 187, is an excessive penalty for the robber, who, as such, does not take human life. Here, the focus must be on petitioner's culpability, not on those who committed the robbery and killings. He did not kill or intend to kill and thus his culpability is different from that of the robbers who killed, and it is impermissible for the State to treat them alike and attribute to petitioner the culpability of those who killed the victims. Pp. 14–16.

(c) Neither deterrence of capital crimes nor retribution is a sufficient justification for executing petitioner. It is unlikely that the threat of the death penalty for murder will measurably deter one such as petitioner who does not kill or intend to kill. As to retribution, this depends on the degree of petitioner's culpability, which must be limited to his participation in the robbery. Putting him to death to avenge two killings that he did not commit or intend to commit or cause would not measurably contribute to the retribution end of ensuring that the criminal gets his just deserts. Pp. 16–19.

399 So. 2d 1362, reversed and remanded.

WHITE, J., delivered the opinion of the Court, in which BRENNAN, MARSHALL, BLACKMUN, and STEVENS, JJ., joined. BRENNAN, J., filed a concurring opinion. O'CONNOR, J., filed a dissenting opinion, in which BURGER, C. J., and POWELL and REHNQUIST, JJ., joined.

NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D.C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

SUPREME COURT OF THE UNITED STATES

No. 81-5321

EARL ENMUND, PETITIONER *v.* FLORIDA

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

[July 2, 1982]

JUSTICE WHITE delivered the opinion of the Court.

I

The facts of this case, taken principally from the opinion of the Florida Supreme Court, are as follows. On April 1, 1975, at approximately 7:45 a.m., Thomas and Eunice Kersey, aged 86 and 74, were robbed and fatally shot at their farmhouse in central Florida. The evidence showed that Sampson and Jeanette Armstrong had gone to the back door of the Kersey house and asked for water for an overheated car. When Mr. Kersey came out of the house, Sampson Armstrong grabbed him, pointed a gun at him, and told Jeanette Armstrong to take his money. Mr. Kersey cried for help, and his wife came out of the house with a gun and shot Jeanette Armstrong, wounding her. Sampson Armstrong, and perhaps Jeanette Armstrong, then shot and killed both of the Kerseys, dragged them into the kitchen, and took their money and fled.

Two witnesses testified that they drove past the Kersey house between 7:30 and 7:40 a.m. and saw a large cream or yellow-colored car parked beside the road about 200 yards from the house and that a man was sitting in the car. Another witness testified that at approximately 6:45 a.m. he saw Ida Jean Shaw, petitioner's common-law wife and Jeanette Armstrong's mother, driving a yellow Buick with a vinyl top which belonged to her and petitioner Earl Enmund. Enmund was a passenger in the car along with an unidentified woman. At about 8 a.m. the same witness saw the car return at a high rate of speed. Enmund was driving, Ida Jean Shaw was in the front seat, and one of the other two people in the car was lying down across the back seat.

Enmund, Sampson Armstrong, and Jeanette Armstrong were indicted for the first-degree murder and robbery of the Kerseys. Enmund and Sampson Armstrong were tried together.[1] The prosecutor maintained in his closing argument that "Sampson Armstrong killed the old people." R. 1577. The judge instructed the jury that "[t]he killing of a human being while engaged in the perpetration of or in the attempt to perpetrate the offense of robbery is murder in the first degree even though there is no premeditated design or intent to kill." App. 6. He went on to instruct them that

> "In order to obtain a conviction of first degree murder while engaging in the perpetration of or in the attempted perpetration of the crime of robbery, the evidence must establish beyond a reasonable doubt that the defendant was actually present and was actively aiding and abetting the robbery or attempted robbery, and that the unlawful killing occurred in the perpetration of or in the attempted perpetration of the robbery." App. 9.

The jury found both Enmund and Sampson Armstrong guilty of two counts of first-degree murder and one count of robbery. A separate sentencing hearing was held and the jury recommended the death penalty for both defendants under the Florida procedure whereby the jury advises the trial judge whether to impose the death penalty. See Fla.

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[1] Jeanette Armstrong's trial was severed and she was convicted of two counts of second-degree murder and one count of robbery and sentenced to three consecutive life sentences. *Enmund* v. *State*, 399 So. 2d 1362, 1371 (Fla. 1981).

Stat. § 921.141(2) (Supp. 1981). The trial judge then sentenced Enmund to death on the two counts of first-degree murder. Enmund appealed, and the Florida Supreme Court remanded for written findings as required by Fla. Stat. § 921.141(3) (Supp. 1981). The trial judge found four statutory aggravating circumstances: the capital felony was committed while Enmund was engaged in or was an accomplice in the commission of an armed robbery, Fla. Stat. § 921.141(5)(d) (Supp. 1981); the capital felony was committed for pecuniary gain, § 921.141(5)(f); it was especially heinous, atrocious, or cruel, § 921.141(5)(h); and Enmund was previously convicted of a felony involving the use or threat of violence, § 921.141(5)(b). 399 So. 2d 1362, 1371–1372 (Fla. 1981). The court found that "*none* of the statutory mitigating circumstances applied" to Enmund and that the aggravating circumstances outweighed the mitigating circumstances. *Id.*, at 1372. Enmund was therefore sentenced to death on each of the murder counts.

The Florida Supreme Court affirmed Enmund's conviction and sentences. It found that "[t]here was no direct evidence at trial that Earl Enmund was present at the back door of the Kersey home when the plan to rob the elderly couple led to their being murdered." *Id.*, at 1370. However, it rejected petitioner's argument that at most he could be found guilty of second-degree murder under Florida's felony-murder rule. The court explained that the interaction of the "felony murder rule and the law of principals combine to make a felon generally responsible for the lethal acts of his co-felon." *Id.*, at 1369, quoting *Adams* v. *State*, 341 So. 2d 765, 768–769 (Fla. 1976), *cert. denied*, 434 U. S. 878 (1977). Although petitioner could be convicted of second-degree murder only if he were an accessory before the fact rather than a principal, the Florida Supreme Court reasoned that,

> ". . . the only evidence of the degree of his participation is the jury's likely inference that he was the person in the

> car by the side of the road near the scene of the crimes. The jury could have concluded that he was there, a few hundred feet away, waiting to help the robbers escape with the Kerseys' money. The evidence, therefore, was sufficient to find that the appellant was a principal of the second degree, constructively present aiding and abetting the commission of the crime of robbery. This conclusion suports the verdicts of murder in the first degree on the basis of the felony murder portion of section 782.04(1)(a)." *Id.*, at 1370.[2]

The state supreme court rejected two of the four statutory aggravating circumstances found by the trial court. It held that the findings that the murders were committed in the course of a robbery and that they were committed for pecuniary gain referred to the same aspect of petitioner's crime and must be treated as only one aggravating circumstance. *Id.*, at 1373. In addition, the court held that "[t]he recited circumstance, that the murders were especially heinous, atrocious, and cruel, cannot be approved." *Ibid.*, citing *Armstrong* v. *State*, 399 So. 2d 953 (Fla. 1981).[3] However, because there were two aggravating circumstances and no mitigating circumstances, the death sentence was affirmed. In so doing, the court expressly rejected Enmund's submission that because the evidence did not establish that he intended to take life, the death penalty was barred by the Eighth Amendment of the United States Constitution. *Id.*, at 1371.

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[2] The Florida Supreme Court's understanding of the evidence differed sharply from that of the trial court with respect to the degree of Enmund's participation. In its sentencing findings, the trial court concluded that Enmund was a major participant in the robbery because he planned the robbery in advance and himself shot the Kerseys. 399 So. 2d, at 1372. Both of these findings, as we understand it, were rejected by the Florida Supreme Court's holding that the only supportable inference with respect to Enmund's participation was that he drove the getaway car. The dissent, while conceding that this holding negated the finding that Enmund was one of the triggermen, argues that the trial court's finding that Enmund planned the robbery was implicitly affirmed. *Post*, at 9. As we have said, we disagree with that view. In any event, the question is irrelevant to the constitutional issue before us, since the Florida Supreme Court held that driving the escape car was enough to warrant conviction and the death penalty, whether or not Enmund intended that life be taken or anticipated that lethal force would be used.

[3] In *Armstrong* the Florida Supreme Court rejected the trial court's

We granted Enmund's petition for certiorari, —— U. S. —— (1981), presenting the question whether death is a valid penalty under the Eighth and Fourteenth Amendments "for one who neither took life, attempted to take life, nor intended to take life." Pet. (i).[4]

II

As recounted above, the Florida Supreme Court held that the record supported no more than the inference that Enmund was the person in the car by the side of the road at the time of the killings, waiting to help the robbers escape. This was enough under Florida law to make Enmund a constructive aider and abettor and hence a principal in first-degree murder upon whom the death penalty could be imposed. It was thus irrelevant to Enmund's challenge to the death sentence that he did not himself kill and was not present at the killings; also beside the point was whether he intended that the Kerseys be killed or anticipated that lethal force would or might be used if necessary to effectuate the robbery or a safe escape. We have concluded that imposition of the death penalty in these circumstances is inconsistent with the Eighth and Fourteenth Amendments.

A

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conclusion that the Kerseys had been killed in order to eliminate them as witnesses, and stated that according to the only direct account of the events, "the shootings were indeed spontaneous and were precipitated by the armed resistance of Mrs. Kersey." 399 So. 2d, at 963.

[4] The petition presented a second question: whether the degree of Enmund's participation in the killings was given the consideration required by the Eighth and Fourteenth Amendment. We do not reach this question.

The Cruel and Unusual Punishment Clause of the Eighth Amendment is directed, in part, "against all punishments which by their excessive length or severity are greatly disproportioned to the offenses charged." *Weems* v. *United States*, 217 U. S. 349, 371 (1910), quoting *O'Neil* v. *Vermont*, 144 U. S. 323, 339–340 (1892) (Field, J., dissenting). This Court most recently held a punishment excessive in relation to the crime charged in *Coker* v. *Georgia*, 433 U. S. 584 (1977). There the plurality opinion concluded that the imposition of the death penalty for the rape of an adult woman "is grossly disproportionate and excessive punishment for the crime of rape and is therefore forbidden by the Eighth Amendment as cruel and unusual punishment." *Id.*, at 592. In reaching this conclusion, it was stressed that our judgment "should be informed by objective factors to the maximum possible extent." *Ibid.* Accordingly, the Court looked to the historical development of the punishment at issue, legislative judgments, international opinion, and the sentencing decisions juries have made before bringing its own judgment to bear on the matter. We proceed to analyze the punishment at issue in this case in a similar manner.

B

The *Coker* plurality observed that "[a]t no time in the last 50 years have a majority of the States authorized death as a punishment for rape." 433 U. S., at 593. More importantly, in reenacting death penalty laws in order to satisfy the criteria established in *Furman* v. *Georgia*, 408 U. S. 238 (1972), only three states provided the death penalty for the rape of an adult woman in their revised statutes. *Id.*, at 594. The plurality therefore concluded that "[t]he current judgment with respect to the death penalty for rape is not wholly unanimous among state legislatures, but it obviously weighs very heavily on the side of rejecting capital punishment as a suitable penalty for raping an adult woman." *Id.*, at 596 (footnote omitted).

Thirty-six state and federal jurisdictions presently authorize the death penalty. Of these, only nine jurisdictions authorize imposition of the death penalty solely for participation in a robbery in which another robber takes life.[5] Of the remaining 27 jurisdictions, in three felony murder is not a capital crime.[6] Eleven states require some culpable mental state with respect to the homicide as a prerequisite to conviction of a crime for which the death penalty is authorized. Of these 11 states, 8 make knowing, intentional, purposeful, or premeditated killing an element of capital murder.[7] Three other states require proof of a culpable mental state short of intent, such as recklessness or extreme indifference to human life, before the death penalty may be imposed.[8] In these 11 states, therefore, the actors in a felony murder are not subject to the death penalty without proof of their mental state, proof which was not required with respect to Enmund either under the trial court's instructions or under the law announced by the Florida Supreme Court.

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[5] Cal. Penal Code Ann. §§ 189, 190.2(a)(17) (West Supp. 1981); Fla. Stat. §§ 782.04(1)(a), 775.082(1), 921.141(5)(d) (1976 & Supp. 1982); Ga. Code §§ 26–1101(b), (c), 27–2534.1(b)(2) (Supp. 1980); Miss. Code Ann. §§ 97–3–19(2)(e), 99–19–101(5)(d) (Supp. 1981); Nev. Rev. Stat. §§ 200.030(1)(b), 200.030(4), 200.033(4) (1981); S.C. Code §§ 16–3–10, 16–3–20(C)(a)(1) (Supp. 1981); Tenn Code Ann. §§ 39–2402(a), 39–2404(i)(7) (Supp. 1981); Wash. Rev. Code §§ 9A.32.030(1)(c)(1), 9A.32.040(1) (1977 & Supp. 1982); Wyo. Stat. §§ 6–4–101, 6–4–102(h)(iv) (Supp. 1981).

[6] Mo. Rev. Stat. §§ 565.001, 565.003, 565.008(2) (1979) (death penalty may be imposed only for capital murder; felony murder is first-degree murder); N.H. Rev. Stat. Ann. §§ 630:1, 630:1(III), 630:1–a(I)(b)(2) (1974) (capital murder includes only killing a law enforcement officer, killing during a kidnapping, and murder for hire); Pa. Stat. Ann., Tit. 18, §§ 2502(a),(b), 1102 (1980) (death penalty may be imposed only for first-degree murder; felony murder is second-degree murder).

[7] Ala. Code §§ 13A–2–23, 13A–5–40(a)(2), 13A–6–2(a)(1) (1977 & Supp. 1981) (to be found guilty of capital murder, accomplice must have had "intent to assist or promote commission of the murder" and murder must be intentional); Ill. Rev. Stat., ch. 38, ¶ 9–1(a)(3); ¶ 9–1(b)(6) (1979) (capital crime only if defendant killed intentionally or with knowledge that his actions "create[d] a strong probability of death or great bodily harm"); La. Rev. Stat. Ann. § 14:30(1) (West Supp. 1981) ("specific intent to kill"); N.M. Stat. Ann. §§ 30–2–1(A)(2), 31–18–14(A), 31–20A–5 (Supp. 1981) (felony murder is a capital crime but death penalty may not be imposed absent intent to kill unless victim was a peace officer); Ohio Rev. Code Ann. §§ 2903.01(B),(C),(D), 2929.02(A), 2929.04.(A)(7) (1981) (accomplice not guilty of capital murder unless he intended to kill); Tex. Penal Code Ann., §§ 19.02(a), 19.03(a)(2) (1974) "intentionally commits the murder in the course of [a felony]"); Utah Code Ann. § 76–5–202(1) (1978) ("intentionally or knowingly causes the death of another"); Va. Code Ann. § 18.2–31(d) (Supp. 1981) ("willful, deliberate and premeditated killing of any person in

Four additional jurisdictions do not permit a defendant such as Enmund to be put to death. Of these, one state flatly prohibits capital punishment in cases where the defendant did not actually commit murder.[9] Two jurisdictions preclude the death penalty in cases such as this one where the defendant "was a principal in the offense, which was committed by another, but his participation was relatively minor, although not so minor as to constitute a defense to prosecution."[10] One other state limits the death penalty in felony

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the commission of robbery while armed with a deadly weapon").

[8] Ark. Stat. Ann. § 41–1501(1)(a) (Supp. 1981) ("extreme indifference to . . . life"); see also § 41–1501, Commentary ("an inadvertent killing in the course of a felony will not . . . . support . . . . a conviction entailing punishment by death"); Del. Code Ann., Title 11, §§ 636(a)(2), (6) (1979) ("recklessly" or "with criminal negligence" causes death during the commission of a felony); Ky. Rev. Stat. § 507.020(b) (Supp. 1980) (defendant must manifest "extreme indifference to human life" and "wantonly engage in conduct which creates a grave risk of death . . . and thereby causes . . . death"); see also Commentary (each accomplice's "participation in [the] felony" must "constitute wantonness manifesting extreme indifference to human life").

[9] Md. Code Ann., Art. 27, §§ 410, 412(b), 413(d)(10), 413(e)(1) (1982) (except in cases of murder for hire, only principal in the first degree subject to the death penalty). In addition, two jurisdictions already accounted for in note 7 also preclude the death penalty where the defendant did not commit the murder. Ill. Rev. Stat., ch. 38, ¶ 9–1(a)(3), ¶ 9–1(b)(6) (1979) (defendant must actually kill victim). Va. Code §§ 18.2–31(d), 18.2–10(a), 18.2–18 (Supp. 1981) (except in cases of murder for hire, only principal in the first degree may be tried for capital murder).

[10] Colo. Rev. Stat. § 16–11–103(5)(d) (1978); 49 U. S. C. § 1473(c)(6)(D) (same).

murders to narrow circumstances not involved here.[11]

Nine of the remaining states deal with the imposition of the death penalty for a vicarious felony murder in their capital sentencing statutes. In each of these states, a defendant may not be executed *solely* for participating in a felony in which a person was killed if the defendant did not actually cause the victim's death. For a defendant to be executed in these states, typically the statutory aggravating circumstances which are present must outweigh mitigating factors. To be sure, a vicarious felony murderer may be sentenced to death in these jurisdictions absent an intent to kill if sufficient aggravating circumstances are present. However, six of these nine states make it a statutory *mitigating* circumstance that the defendant was an accomplice in a capital felony committed by another person and his participation was relatively minor.[12] By making minimal participation in a capital felony committed by another person a mitigating circumstance, these sentencing statutes reduce the likelihood that a person will be executed for vicarious felony murder. The remaining three jurisdictions exclude felony murder from their lists of aggravating circumstances that will support a death sentence.[13] In each of these nine states, a non-triggerman guilty of felony murder cannot be sentenced to death for the felony murder absent aggravating circumstances above and beyond the felony murder itself.

Thus only a small minority of jurisdictions—nine—allow the death penalty to be imposed solely because the defendant somehow participated in a robbery in the course of which a murder was committed. Even if the nine states are included where such a defendant could be executed for an unintended felony murder if sufficient aggravating circumstances are present to outweigh mitigating circumstances—which often include the defendant's minimal participation in the murder—only about a third of American jurisdictions would ever permit a defendant who somehow participated in a robbery where a murder occurred to be sentenced to die. Moreover, of the eight states which have enacted new death-penalty statutes since 1978, only one authorizes capital punishment in such circumstances.[14] While the current legislative judgment with respect to imposition of the death penalty where a defendant did not take life, attempt to take it, or intend to take life is neither "wholly unanimous among state legislatures," *Coker* v. *Georgia*, 433 U. S., at 596, nor as compelling as the legislative judgments considered in *Coker*, it nevertheless weighs on the side of rejecting capital punishment for the crime at issue.[15]

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[11] Vt. Stat. Ann., Tit. 13, §§ 2303(b), (c) (Supp. 1981) (capital murder reserved for offenders who commit a second unrelated murder or murder of a correctional officer).

[12] Ariz. Rev. Stat. § 13–703G(3) (Supp. 1981) ("relatively minor" participation); Conn. Gen. Stat. § 56a–46a(f)(4) (Supp. 1981); Ind. Code § 35–50–2–9(c)(4) (1979) (same); Mont. Code Ann. § 46–18–304(6) (1979) (same); Neb. Rev. Stat. § 29–2523(2)(e) (1979) (same); N.C. Gen. Stat. § 15(A)–2000(f)(4) (Supp. 1981) (same).

[13] Idaho Code § 19–2515(f) (1979); Okla. Stat., Tit. 21, § 701.12 (Supp. 1981); S.D. Comp. Laws Ann. § 23A–27A–1 (Supp. 1981).

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[14] See the Ala., Colo., Conn., Md., Ohio, Pa., S.D., and Wash. statutes cited in notes 5–7, 9, 10, 12 and 13, *supra*.

[15] The dissent characterizes the state statutes somewhat differently. It begins by noting that 32 states "authorize a sentencer to impose a death sentence for a death that occurs during the course of a robbery." *Post*, at 19. That is not relevant to this case, however. Rather, at issue is the number of states which authorize the death penalty where the defendant did not kill, attempt to kill, or intend to kill. The dissent divides the statutes into three categories. Its first category of 21 statutes include nine about which there is no disagreement—Cal., Fla., Ga., Miss., Nev., S.C., Tenn., Wash., and Wyo. In 11 other states listed by the dissent—Ariz., Colo., Conn., Idaho, Ind., Mont., Neb., N.M., N.C., Okla., and S.D.—the dissent looks solely at the provisions defining the *crime* of capital murder. Colorado's capital sentencing statute makes a defendant's minimal participation in a murder an absolute defense to imposition of the death penalty. See n. 10, *supra*. Contrary to the dissent's claim that this provision would have been of no help to petitioner, see n. 36, *post*, if the case is judged on the basis of the Florida Supreme Court's findings, see n. 2, *supra*, Colorado law may well have barred imposition of the death penalty in this case. Similarly, the Ariz., Conn., Ind., Mont., Neb., and N.C. capital sentencing statutes do not permit capital punishment solely for vicarious felony mur-

C

Society's rejection of the death penalty for accomplice liability in felony murders is also indicated by the sentencing decisions that juries have made. As we have previously observed, "[t]he jury . . . is a significant and reliable objective index of contemporary values because it is so directly involved." *Coker* v. *Georgia*, *supra*, at 596, quoting *Gregg* v. *Georgia*, 428 U. S. 153, 181 (1976). The evidence is overwhelming that American juries have repudiated imposition of the death penalty for crimes such as petitioner's. First, ac-

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der and reduce the likelihood that the death penalty will be imposed on a vicarious felony murderer, even where aggravating circumstances are present, by making a defendant's minimal participation in the homicide a mitigating circumstance. See n. 12, *supra*. Three other states—Idaho, Okla., and S.D.—allow a defendant who does not kill or actually kill to be executed only where other aggravating circumstances are present, and in those states the felony murder itself cannot serve as an aggravating circumstance. See n. 13, *supra*. New Mexico's capital sentencing statute requires the jury to find at least one statutory aggravating circumstance before the death penalty may be imposed, and in addition aggravating circumstances must outweigh mitigating circumstances. N.M. Stat. Ann. § 31-20A-4(C)(1) and (2) (Supp. 1981). The statute lists seven statutory aggravating circumstances, six of which require an intent to kill. N.M. Stat. Ann. § 31-20A-5(B)-(G) (Supp. 1981). The only aggravating circumstance which does not include an intent element is not applicable here, for it requires that the victim must be "a peace officer who us acting in the lawful discharge of an official duty when he was murdered." N.M. Stat. Ann. § 31-20A-5(A) (Supp. 1981). The remaining state, Vermont, limits the death penalty to narrow circumstances not present here. See n. 11, *supra*.

There is no disagreement that three states require a culpable mental state short of intent before a nontriggerman may be put to death, compare n. 5, *supra*, with n. 37, *post*, a mental state which Enmund was not proven to possess. Similarly, the dissent's second category of seven states which authorize the death penalty only if the defendant had specific intent to kill the victim differs from our group of specific intent states only because we include New Mexico in that group. Compare n. 7, *supra*, with n. 38, *post*. Finally, there is no disagreement that three states restrict application of the death penalty to felony murderers who actually kill. Compare n. 6, *supra*, with n. 39, *post*.

cording to the petitioner, a search of all reported appellate court decisions since 1954 in cases where a defendant was executed for homicide shows that of the 362 executions, in 339 the person executed personally committed a homicidal assault.[16] In 2 cases the person executed had another person commit the homicide for him, and in 16 cases the facts were not reported in sufficient detail to determine whether the person executed committed the homicide.[17] The survey revealed only 6 cases out of 362 where a nontriggerman felony murderer was executed. All six executions took place in 1955. By contrast, there were 72 executions for rape in this country between 1955 and this Court's decision in *Coker* v. *Georgia* in 1977.[18]

That juries have rejected the death penalty in cases such as this one where the defendant did not commit the homicide, was not present when the killing took place, and did not participate in a plot or scheme to murder is also shown by petitioner's survey of the nation's death-row population.[19] As of October 1, 1981, there were 796 inmates under sentences of death for homicide. Of the 739 for whom sufficient data are available, only 41 did not participate in the fatal assault on the victim. Of the 40 among the 41 for whom sufficient information was available, only 16 were not physically present when the fatal assault was committed. These 16 prisoners included only 3, including petitioner, who were sentenced to die absent a finding that they hired or solicited someone else to kill the victim or participated in a scheme designed to kill the victim. The figures for Florida are similar.[20] Forty-five felony murderers are currently on death row. The Florida Supreme Court either found or affirmed a trial court or jury finding that the defendant intended life to be taken in 36 cases. In eight cases the courts made no finding with respect to intent, but the defendant was the triggerman in each case. In only one case—Enmund's—there was no finding of an intent to kill and the defendant was not the triggerman.[21] The State does not challenge this analysis of the Florida cases.

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[16] See Brief for Petitioner, App. D.

[17] There is no reason to believe that this group of 16 contains a higher proportion of non-triggermen than does the rest of the defendants studied.

[18] See NAACP Legal Defense and Educational Fund, Inc., Death Row U. S. A., at 1 n. * (Oct. 20, 1981).

[19] See Brief for Petitioner, App. E; NAACP Legal Defense Educational Fund, Inc., Death Row U. S. A. (Oct. 20, 1981).

[20] See Reply Brief for Petitioner, App. A-1 – A-7.

The dissent criticizes these statistics on the ground that they do not reveal the percentage of homicides that were charged as felony murders or the percentage of cases where the State sought the death penalty for an accomplice guilty of felony murder. *Post*, at 18. We doubt whether it is possible to gather such information, and at any rate, it would be relevant if prosecutors rarely sought the death penalty for accomplice felony murder, for it would tend to indicate that prosecutors, who represent society's interest in punishing crime, consider the death penalty excessive for accomplice felony murder. The fact remains that we are not aware of a single person convicted of felony murder over the past quarter century who did not kill or attempt to kill, and did not intend the death of the victim, who has been executed, and that only three persons in that category are presently sentenced to die. Nor can these figures be discounted by attributing to petitioner the argument that "death is an unconstitutional penalty absent an intent to kill," *post*, at 18, and observing that the statistics are incomplete with respect to intent. Petitioner's argument is that because he did not kill, attempt to kill, *and* he did not intend to kill, the death penalty is disproportionate as applied to him, and the statistics he cites are adequately tailored to demonstrate that juries—and perhaps prosecutors as well—consider death a disproportionate penalty for those who fall within his category.[22]

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[21] These statistics concerning the number of vicarious felony-murderers who have been executed and the number of them on death row are consistent with the findings of a study of 111 cases in which the defendant was found guilty of a capital crime and hence could have received the death penalty. Kalven & Zeisel, The American Jury and the Death Penalty, 33 U. Chi. L. Rev. 769 (1966). The authors found that juries rebel "at imposing the death penalty for the vicarious criminal responsibility of the defendant," *id.*, at 776, to the extent that felony murder and accomplice factors accounted for more jury decisions not to impose the death penalty when the trial judge decided to impose the death penalty than any other factor. *Id.*, at 777. The authors had anticipated that "because of the rigidity of the felony murder rule, the jury's sense of equity would produce a broad area of disagreement." *Id.*, at 776, n. 10. However, they found that "disagreement over the rule emerges only at the level of the death penalty." *Ibid.*

III

Although the judgments of legislatures, juries and prosecutors weigh heavily in the balance, it is for us ultimately to judge whether the Eighth Amendment permits imposition of the death penalty on one such as Enmund who aids and abets a felony in the course of which a murder is committed by others but who does not himself kill, attempt to kill, or intend that a killing take place or that lethal force will be employed. We have concluded, along with most legislatures and juries, that it does not.

We have no doubt that robbery is a serious crime deserving serious punishment. It is not, however, a crime "so grievous an affront to humanity that the only adequate response may be the penalty of death." *Gregg* v. *Georgia, supra,* at 184 (footnote omitted). "[I]t does not compare with murder, which does involve the unjustified taking of human life. Although it may be accompanied by another crime, [robbery] by definition does not include the death of or even the serious injury to another person. The murderer kills; the [robber], if no more than that, does not. Life is over for the victim of the murderer; for the [robbery] victim, life . . . is not over and normally is not beyond repair." *Coker* v. *Georgia, supra,* at 598. As was said of the crime of rape in *Coker,* we have the abiding conviction that the death penalty, which is "unique in its severity and irrevocability," *Gregg* v. *Georgia, supra,* at 187, is an excessive penalty for the robber who, as such, does not take human life.

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[22] "[T]he climate of international opinion concerning the acceptability of a particular punishment" is an additional consideration which is "not irrelevant." *Coker* v. *Georgia*, *supra*, at 596, n. 10. It is thus worth noting that the doctrine of felony murder has been abolished in England and India, severely restricted in Canada and a number of other Commonwealth countries, and is unknown in continental Europe. ALI, Model Penal Code § 210.2 at 39–40 (Official Draft and Revised Comments 1980). It is also relevant that death sentences have not infrequently been commuted to terms of imprisonment on the grounds of the defendant's lack of premeditation and limited participation in the homicidal act. See Wolfgang, Kelly, and Nolde, Comparison of the Executed and Commuted Among Admissions to Death Row, 53 J. Crim. L. Crim. & Pol. Sci. 301, 310 (1953).

Here the robbers did commit murder; but they were subjected to the death penalty only because they killed as well as robbed. The question before us is not the disproportionality of death as a penalty for murder, but rather the validity of capital punishment for for Enmund's own conduct. The focus must be on *his* culpability, not on that of those who committed the robbery and shot the victims, for we insist on "individualized consideration as a constitutional requirement in imposing the death sentence," *Lockett* v. *Ohio,* 438 U. S. 586, 605 (1978) (footnote omitted), which means that we must focus on "relevant facets of the character and record of the individual offender." *Woodson* v. *North Carolina,* 428 U. S. 280, 304 (1976). Enmund himself did not kill or attempt to kill; and as construed by the Florida Supreme Court, the record before us does not warrant a finding that Enmund had any intention of participating in or facilitating a murder. Yet under Florida law death was an authorized penalty because Enmund aided and abetted a robbery in the course of which murder was committed. It is fundamental that "causing harm intentionally must be punished more severely than causing the same harm unintentionally." H. Hart, Punishment and Responsibility 162 (1968). Enmund did not kill or intend to kill and thus his culpability is plainly different from that of the robbers who killed; yet the state treated them alike and attributed to Enmund the culpability of those who killed the Kerseys. This was impermissible under the Eighth Amendment.

In *Gregg* v. *Georgia* the prevailing opinion observed that "[t]he death penalty is said to serve two principal social purposes: retribution and deterrence of capital crimes by prospective offenders." 428 U. S., at 183 (footnote omitted). Unless the death penalty when applied to those in Enmund's position measurably contributes to one or both of these goals, it "is nothing more than the purposeless and needless imposition of pain and suffering," and hence an unconstitutional punishment. *Coker* v. *Georgia*, *supra*, at 592. We are quite unconvinced, however, that the threat that the death penalty will be imposed for murder will measurably deter one who does not kill and has no intention or purpose that life will be taken. Instead, it seems likely that "capital punishment can serve as a deterrent only when murder is the result of premeditation and deliberation," *Fisher* v. *United States*, 328 U. S. 463, 484 (1946) (Frankfurter, J., dissenting), for if a person does not intend that life be taken or contemplate that lethal force will be employed by others, the possibility that the death penalty will be imposed for vicarious felony murder will not "enter into the cold calculus that precedes the decision to act." *Gregg* v. *Georgia*, *supra*, at 186.

It would be very different if the likelihood of a killing in the course of a robbery were so substantial that one should share the blame for the killing if he somehow participated in the felony. But competent observers have concluded that there is no basis in experience for the notion that death so frequently occurs in the course of a felony for which killing is not an essential ingredient that the death penalty should be considered as a justifiable deterrent to the felony itself. ALI, Model Penal Code § 210.2, Comment at 38 and n. 96 (Official Draft and Revised Comments 1980). This conclusion was based on three comparisons of robbery statistics, each of which showed that only about one-half of one percent of robberies resulted in homicide.[23] The most recent national crime statistics strongly support this conclusion.[24] In addition to the evidence that killings only rarely occur during robberies is the fact, already noted, that however often death occurs in the course of a felony such as robbery, the death penalty is rarely imposed on one only vicariously guilty of the murder, a fact which further attenuates its possible utility as an effective deterrence.

As for retribution as a justification for executing Enmund, we think this very much depends on the degree of Enmund's culpability—what Enmund's intentions, expectations, and actions were. American criminal law has long considered a defendant's intention—and therefore his moral guilt—to be crit-

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[23] The statistics relied upon by the American Law Institute may be summarized as follows:

Date & Location	*No. of Robberies*	*Robberies Accompanied by Homicide*	*%*
Cook County, Ill. 1926–1927	14,392 (est.)	71	.49
Philadelphia, Pa. 1948–1952	6,432	38	.59
New Jersey 1975	16,273	66	.41

ALI, Model Penal Code § 210.1, Comment at 38, n. 96 (Official Draft and Revised Comments 1980).

[24] An estimated total of 548,809 robberies occurred in the United States in 1980. United States Dept. of Justice, Federal Bureau of Investigation, Uniform Crime Reports 17 (1981). Approximately 2,361 persons were murdered in the United States in 1980 in connection with robberies, *id.*, at 13, and thus only about .43% of robberies in the United States in 1980 resulted in homicide. See also Cook, The Effect of Gun Availability on Robbery and Robbery Murder, in Haveman and Zellner, 3 Policy Studies Review Annual 743, 747 (1980) (.48% of all robberies result in murder).

ical to "the degree of [his] criminal culpability," *Mullaney* v. *Wilbur*, 421 U. S. 684, 698 (1975), and the Court has found criminal penalties to be unconstitutionally excessive in the absence of intentional wrongdoing. In *Robinson* v. *California*, 370 U. S. 660, 667 (1962), a statute making narcotics addiction a crime was struck down under the Eighth Amendment even though such addiction "is apparently an illness which may be contracted innocently or involuntarily." Similarly, in *Weems* v. *United States*, *supra*, the Court invalidated a statute making it a crime for a public official to make a false entry in a public record but not requiring the offender "to injure[] any one by his act or intend[] to injure any one." 217 U. S., at 363. The Court employed a similar approach in *Godfrey* v. *Georgia*, 446 U. S. 420, 433 (1980), reversing a death sentence based on the existence of an aggravating circumstance because the defendant's crime did not reflect "a consciousness materially more 'depraved' than that of any person guilty of murder."

For purposes of imposing the death penalty, Enmund's criminal culpability must be limited to his participation in the robbery, and his punishment must be tailored to his personal responsibility and moral guilt. Putting Enmund to death to avenge two killings that he did not commit and had no intention of committing or causing does not measurably contribute to the retributive end of ensuring that the criminal gets his just deserts. This is the judgment of most of the legislatures that have recently addressed the matter, and we have no reason to disagree with that judgment for purposes of construing and applying the Eighth Amendment.

IV

Because the Florida Supreme Court affirmed the death penalty in this case in the absence of proof that Enmund killed or attempted to kill, and regardless of whether Enmund intended or contemplated that life would be taken, we reverse the judgment upholding the death penalty and remand for further proceedings not inconsistent with this opinion.

So Ordered.

[illegible] criminal penalties to be unconstitutionally excessive in the absence of intentional wrongdoing. In *Robinson* v. *California*, 370 U. S. 660, 667 (1962), a statute making narcotics addiction a crime was struck down under the Eighth Amendment even though addiction "is apparently an illness which may be contracted innocently or involuntarily." Similarly, in *Weems* v. *United States*, *supra*, the Court invalidated a statute making it a crime for a public official to make a false entry in a public record but not requiring the offender to "injur[e] any one by his act or inten[d] to injure any one." 217 U. S., at 363. The Court remanded for resentencing in *Godfrey* v. *Georgia*, 446 U. S. 420, 433 (1980), reversing a death sentence based on the existence of an aggravating circumstance because the defendant's crime did not reflect "a consciousness materially more 'depraved' than that of any person guilty of murder."

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SUPREME COURT OF THE UNITED STATES

No. 81-5321

EARL ENMUND, PETITIONER *V*. FLORIDA

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

[July 2, 1982]

JUSTICE BRENNAN, concurring.

I join the Court's opinion. However, I adhere to my view that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments. See *Gregg* v. *Georgia*, 428 U. S. 153, 227 (1976) (dissenting opinion).

SUPREME COURT OF THE UNITED STATES

No. 81-5321

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ON WRIT OF CERTIORARI TO THE SUPREME COURT
OF FLORIDA

[July 2, 1982]

JUSTICE O'CONNOR, with whom THE CHIEF JUSTICE, JUSTICE POWELL, and JUSTICE REHNQUIST join, dissenting.

Today the Court holds that the Eighth Amendment prohibits a State from executing a convicted felony murderer. I dissent from this holding not only because I believe that it is not supported by the analysis in our previous cases, but also because today's holding interferes with state criteria for assessing legal guilt by recasting intent as a matter of federal constitutional law.

I

The evidence at trial showed that at approximately 7:30 a.m. on April 1, 1975, Sampson and Jeanette Armstrong approached the backdoor of Thomas and Eunice Kersey's farmhouse on the pretext of obtaining water for their overheated car.[1] When Thomas Kersey retrieved a water jug to help the Armstrongs, Sampson Armstrong grabbed him, held a gun to him, and told Jeanette Armstrong to take his wallet. Hearing her husband's cries for help, Eunice Kersey came around the side of the house with a gun and shot Jeanette Armstrong. Sampson Armstrong, and perhaps Jeanette Armstrong, returned the fire, killing both of the Kerseys.[2]

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[1] Much of the evidence concerning these crimes came from J. B. Neal, to whom Sampson Armstrong made numerous admissions on the day of the murders. See Record (R.) 1344–1365.

[2] J. B. Neal testified that Armstrong had told him that two guns were

The Armstrongs dragged the bodies into the kitchen, took Thomas Kersey's money, and fled to a nearby car, where the petitioner, Earl Enmund, was waiting to help the Armstrongs escape. R. 1348–1351.[3]

Ida Jean Shaw[4] testified that on March 31 the petitioner and the two Armstrongs were staying at her house. When she awoke on April 1, the day of the murders, the petitioner, Jeanette, and Sampson, as well as Shaw's 1969 yellow Buick, were gone. R. 1185–1186. A little after eight o'clock, either the petitioner or Sampson Armstrong entered the house and told her that Jeanette had been shot. R. 1187–1188. After learning that Jeanette had been shot during a robbery, Shaw asked the petitioner "why he did it." Enmund answered that he had decided to rob Thomas Kersey after he had seen Kersey's money a few weeks earlier. R. 1205.[5] At the same time, Sampson Armstrong volunteered that he had made sure that the Kerseys were dead. R. 1207–1208.

Ida Jean Shaw also testified that, pursuant to the petitioner's and Sampson Armstrong's instructions, she had disposed of a .22 caliber pistol that she normally kept in her car, as well as a .38 caliber pistol belonging to the Armstrongs. R. 1198–1202. The murder weapons were never recovered.[6]

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involved; Jeanette had one and Sampson had the other. R. 1354.

[3] An autopsy revealed that Mr. Kersey had been shot twice, once with a .38 caliber bullet, and once with a .22 caliber bullet. Mrs. Kersey had been shot six times; of the bullets that could be identified, two were fired from a .38 caliber gun, and one from a .22 caliber gun. According to a firearms expert, the .22 caliber bullets were fired from the same gun, and the .38 caliber bullets were fired from the same gun. See *Enmund* v. *State*, 399 So. 2d 1362, 1364 (Fla. 1981).

[4] Ida Jean Shaw was the petitioner's common law wife and Jeanette Armstrong's mother. She was later given immunity from prosecution in return for her testimony. R. 1178–1179.

[5] Thomas Kersey normally kept large sums of money in his wallet and indiscriminately showed the cash to people he dealt with. A few weeks before his murder, Kersey revealed the contents of his wallet to the petitioner and bragged that at any time he could "dig up $15,000, $16,000." 399 So. 2d, at 1365. See R. 1205–1206.

[6] Ida Jean Shaw's trial testimony contradicted her earlier statements to

In his closing argument, the prosecutor did not argue that Earl Enmund had killed the Kerseys. Instead, he maintained that the petitioner had initiated and planned the armed robbery, and was in the car during the killings. According to the prosecutor, "Sampson Armstrong killed the old people." R. 1577.[7]

After deliberating for four hours, the jury found Sampson Armstrong and the petitioner each guilty of two counts of first degree murder[8] and one count of robbery.[9] The jury

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police. When police initially questioned her, she insisted that Jeanette had been shot by an unknown assailant while she and Jeanette had been traveling to a nearby town. R. 1191–1192. Later she gave investigators a statement implicating the petitioner and Sampson Armstrong in the murders. R. 1209–1210. Subsequently, she gave two more statements repudiating the statement implicating the petitioner. R. 1208–1209.

In his closing argument, the prosecutor acknowledged the conflict between Ida Jean Shaw's testimony that she was not in the yellow Buick the morning of the murders, and the testimony of a witness who saw her in the car shortly before and after the murders. The prosecutor deemed the inconsistency irrelevant. R. 1571–1572.

[7] At the sentencing hearing, the prosecutor theorized that the petitioner was not the "trigger man," but the "person who set it all up." R. 1679. The prosecutor admitted that he did not "know whether [the petitioner] set foot inside that house or not. But he drove them there. He set it up, planned it." R. 1679–1680. In this Court as well, the State acknowledges that the petitioner "was apparently not the triggerman in the two murders involved in his [*sic*] case." Brief for Respondent State of Florida in Opposition to Petition for Certiorari, at 14.

[8] In Florida at the time of the Kersey murders, first degree murder was defined in Fla. Stat. § 782.04(1)(a) (1973) as

"The unlawful killing of a human being, when perpetrated from a premeditated design to effect the death of the person killed or any human being, or when committed by a person engaged in the perpetration of, or in the attempt to perpetrate, any . . . robbery. . . ."

In instructing the jury on first degree murder, the judge read the above provision verbatim. R. 1605–1606. He also added that

"The killing of a human being while engaged in the perpetration of or in the attempt to perpetrate the offense of robbery is murder in the first degree even though there is no premeditated design or intent to kill." R. 1606.

then heard evidence pertaining to the appropriate sentence for the two defendants, and recommended the death penalty for each defendant on each of the murder counts.[10]

In its sentencing findings,[11] the trial court found four statutory aggravating circumstances regarding the petitioner's involvement in the murder: (1) the petitioner previously had

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Distinguishing first and second degree felony murder, the judge stated: "In order to sustain a conviction of first degree murder while engaging in the perpetration of or in the attempted perpetration of the crime of robbery, the evidence must establish beyond a reasonable doubt that the defendant was actually present and was actively aiding and abetting the robbery or attempted robbery, and that the unlawful killing occurred in the perpetration of or in the attempted perpetration of the robbery.

"In order to sustain a conviction of second degree murder while engaged in the perpetration of or the attempted perpetration of robbery, the evidence must establish beyond a reasonable doubt that the unlawful killing was committed in the perpetration of or in the attempted perpetration of robbery, and that the defendant actually, although not physically present at the time of the commission of the offense, did, nonetheless, procure, counsel, command or aid another to commit the crime." R. 1609–1610.

[9] On the motion of the petitioner and the prosecution, Jeanette Sampson's trial had been severed from the trial of her co-defendants. R. 50, 57. Jeanette Armstrong was tried first and convicted of two counts of second degree murder and one count of robbery. The trial judge sentenced her to three consecutive life sentences. *Enmund* v. *State*, 399 So. 2d 1362, 1371 (Fla. 1981).

[10] Under Florida law, the "court shall conduct a separate sentencing proceeding to determine whether the defendant should be sentenced to death or life imprisonment." Fla. Stat. § 921.141(1). The jury renders only an "advisory sentence" based on the mitigating and aggravating circumstances. *Id.*, § 921.141(2).

At the sentencing hearing, the petitioner presented no evidence, R. 1677, but his attorney argued that the death penalty was inappropriate because at most the evidence showed that the petitioner saw Thomas Kersey's money, suggested the robbery, and drove the Armstrongs to the Kersey house. R. 1683–1684. He also argued that death was an excessive penalty because the gunfight was spontaneous, and beyond the petitioner's control. R. 1684.

[11] Initially, the trial court failed to make written findings as required by Fla. Stat. § 921.141(3). On the first state appeal, the Florida Supreme Court remanded the case for such findings. See Joint Appendix (J. A.) 29.

been convicted of a felony involving the use of violence (an armed robbery in 1957), Fla. Stat. § 921.141(5)(b); (2) the murders were committed during the course of a robbery, *id.* § 921.141(5)(d); (3) the murders were committed for pecuniary gain, *id.* § 921.141(5)(f); and (4) the murders were especially heinous, atrocious, or cruel because the Kerseys had been shot in a prone position in an effort to eliminate them as witnesses, *id.* § 921.141(5)(h). J. A. 30–31; 399 So. 2d, at 1371–1372.[12]

The trial court also found that "*none* of the statutory mitigating circumstances applied" to the petitioner. J. A. 32 (emphasis in original). Most notably, the court concluded that the evidence clearly showed that the petitioner was an accomplice to the capital felony and that his participation had not been "relatively minor," but had been major in that he "planned the capital felony and actively participated in an attempt to avoid detection by disposing of the murder weapons." J. A. 32; 399 So. 2d, at 1373. See Fla. Stat. § 921.141(6)(d).[13]

Considering these factors, the trial court concluded that the "aggravating circumstances of these capital felonies outweigh the mitigating circumstances," and imposed the death penalty for each count of murder. J. A. 32; 399 So. 2d, at 1373. The court sentenced the petitioner to life imprisonment for the robbery. J. A. 28.[14]

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[12] Regarding the extent of the petitioner's involvement, the trial court reasoned that because two different guns had been used in the murders, and because Jeanette Armstrong had been seriously wounded by gunfire, the petitioner must have fired one of the guns. Moreover, since each of the Kerseys was injured by a bullet of each type, the petitioner must have shot each victim. J. A. 31; 399 So. 2d, at 1372.

[13] The court also rejected the other statutory mitigating circumstances. In particular, the petitioner did not have a record free of criminal convictions, Fla. Stat. § 921.141(6)(a); there was no evidence that he had acted under the influence of extreme mental or emotional disturbance, *id.* § 921.141(6)(b); there was no evidence that the victims were participants in or consented to the crimes, *id.* § 921.141(6)(c); there was no evidence that he acted under extreme duress or under the substantial domination of another person, *id.* § 921.141(6)(e); there was no evidence that the petitioner was incapable of appreciating the criminality of his conduct or conforming his conduct to the requirements of law, *id.* § 921.141(6)(f); and because he was 42 years old at the time of the offense, his age was not a mitigating factor, *id.* § 921.141(6)(g). J. A. 32; 399 So. 2d, at 1372–1373.

On appeal, the Florida Supreme Court affirmed the petitioner's convictions and sentences.[15] In challenging his convictions for first degree murder, the petitioner claimed that there was no evidence that he had committed premeditated murder, or that he had been present aiding and abetting the robbery when the Kerseys were shot. He argued that since the jury properly could have concluded only that he was in the car on the highway when the murders were committed, he could be found guilty at most of second degree murder under the State's felony murder rule.[16]

The court rejected this argument. Quoting from an earlier case, the Florida Supreme Court held that

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[14] The trial court made nearly identical findings for Sampson Armstrong. In particular, it found that the murders were committed during the course of a robbery, that they were committed for pecuniary gain, and that they were especially heinous, atrocious, or cruel. See *Armstrong* v. *State*, 399 So. 2d 953, 960–961 (Fla. 1981). The trial court considered the only possible mitigating circumstance to be Armstrong's age (23), but did not actually find that fact to be mitigating. See *id.*, at 962 ("the factor of age was given no consideration"). Finding that the aggravating circumstances outweighed the mitigating circumstances, the trial judge imposed the death penalty for each murder conviction, and imposed a life sentence for the robbery. *Id.*, at 955, 962.

[15] The Florida Supreme Court also affirmed the convictions and sentences of Sampson Armstrong. See *Armstrong* v. *State*, *supra*, at 960.

[16] Second degree murder, based on felony murder, is defined in Fla. Stat. § 782.04(3) (1973):

"When . . . committed in the perpetration of, or in the attempt to perpetrate, any . . . robbery . . . , except as provided in subsection (1), it shall be murder in the second degree . . . punishable by imprisonment in the state prison for life or for such term of years as may be determined by the court."

> "an individual who personally kills another during the perpetration or attempt to perpetrate one of the enumerated felonies is guilty of first degree murder. . . . Moreover, the felon's liability for first degree murder extends to all of his co-felons who are personally present. As perpetrators of the underlying felony, they are principals in the homicide. In Florida, as in the majority of jurisdictions, the felony murder rule and the law of principals combine to make a felon generally responsible for the lethal acts of his co-felon. Only if the felon is an accessory before the fact and not personally present does liability attach under the second degree murder provision of the applicable statute in the instant case." 399 So. 2d, at 1369 (quoting *Adams* v. *State*, 341 So. 2d 765, 768–769 (Fla. 1976) (footnote omitted), cert. denied, 434 U. S. 878 (1977)).

Consequently, the critical issue regarding liabilty was whether the petitioner's conduct would make him a principal or merely an accessory before the fact to the underlying robbery. Under Florida law at the time of the murders, "if the accused was present aiding and abetting the commission or attempt of one of the violent felonies listed in the first-degree murder statute, he is equally guilty, with the actual perpetrator of the underlying felony, of first-degree murder." 399 So. 2d, at 1370. Moreover,

> "the presence of the aider and abetter need not have been actual, but it is sufficient if he was constructively present, provided the aider, pursuant to a previous understanding, is sufficiently near and so situated as to abet or encourage, or to render assistance to, the actual perpetrator in committing the felonious act or in escaping after its commission." *Ibid.* (quoting *Pope* v. *State*, 84 Fla. 428, 446, 94 So. 865, 871 (1922)).

The court noted that there "was no direct evidence at trial that Earl Enmund was present at the back door of the Kersey home when the plan to rob the elderly couple led to their being murdered." *Ibid.*[17] Instead,

> "the only evidence of the degree of his participation is the jury's likely inference that he was the person in the car by the side of the road near the scene of the crimes. The jury could have concluded that he was there, a few hundred feet away, waiting to help the robbers escape with the Kerseys' money." *Ibid.*

This evidence, the court concluded, was sufficient to find the petitioner to be a principal under state law, "constructively aiding and abetting the commission of the crime of robbery," and thus guilty of first degree murder. *Ibid.*

Turning to the trial court's written sentencing findings, the state supreme court rejected two of the four aggravating circumstances. First, the court held that two of the trial judge's findings—that the murders were committed both in the course of robbery and for pecuniary gain—referred to the same aspect of the petitioner's crime. Consequently, these facts supported only one aggravating circumstance. Second, citing *Armstrong* v. *State*, 399 So. 2d 953 (Fla. 1981), the court held that "[t]he recited circumstance, that the murders were especially heinous, atrocious, and cruel, cannot be approved." 399 So. 2d, at 1373.[18] The court affirmed the trial court's findings that none of the statutory mitigating circumstances applied. *Ibid.* Because one of those findings was that Enmund's participation in the capital felony was not minor, due to his role in planning the robbery, the state supreme court implicitly affirmed the finding that Enmund had planned the robbery.

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[17] The court also noted that Sampson Armstrong's admissions to J. B. Neal made no mention of the petitioner, and that the petitioner's admissions to Ida Jean Shaw indicated only "his complicity." 399 So. 2d, at 1370.

[18] In *Armstrong*, the Florida Supreme Court expressly had rejected the trial court's conclusion that the Kerseys were murdered in order to eliminate them as witnesses. "It simply cannot be said that there was proof that the robbers killed in order to assure that there would be no witnesses against them." 399 So. 2d, at 963. On the contrary, "[t]he only direct account of what transpired is from the testimony of J. B. Neal about Armstrong's statement to him. By that account, the shootings were indeed spontaneous and were precipitated by the armed resistance of Mrs. Ker-

Regarding the petitioner's claim that imposition of the death penalty, absent a showing that he intended to kill, would violate the Eighth Amendment's ban on cruel and unusual punishments, the court simply stated that the petitioner "offers us no binding legal authority that directly supports this proposition, and we therefore reject it." *Id.*, at 1371.

II

Earl Enmund's claim in this Court is that the death sentence imposed by the Florida trial court, and affirmed by the Florida Supreme Court, is unconstitutionally disproportionate to the role he played in the robbery and murders of the Kerseys.[19] In particular, he contends that because he had no actual intent to kill the victims—in effect, because his behavior and intent were no more blameworthy than that of any robber—capital punishment is too extreme a penalty.[20]

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sey." *Ibid.* In reaching this conclusion, the state supreme court also rejected the trial court's conclusions derived from the pathologist's testimony. Rather than indicating that the victims were prone when shot, the pathologist's testimony "as to the direction of fire and the positions of the victims when shot [was] equivocal at best." 399 So. 2d, at 963.

[19] In this Court, the petitioner neither challenges his convictions for robbery and felony murder nor argues that the State has overstepped constitutional bounds in defining murder to include felony murder. The petitioner's sole challenge is to the penalty imposed for the murders.

[20] Although the petitioner ostensibly relies on the fact that he was not the triggerman, the core of his argument is that the death penalty is disproportionate to his crime because he did not have the specific intent to kill the Kerseys. Pulling the trigger is only one factor, albeit a significant one, in determining intent. See Tr. Oral Arg. (Mar. 23, 1982), at 21-23

In *Gregg* v. *Georgia*, 428 U. S. 153 (1976), a majority of this Court concluded that the death penalty does not invariably violate the Cruel and Unusual Punishments Clause of the Eighth Amendment.[21] See *id.*, at 187 (opinion of Stewart, POWELL, and STEVENS, JJ.) ("[W]hen a life has been taken deliberately by the offender, we cannot say that the punishment is invariably disproportionate to the crime. It is an extreme sanction, suitable to the most extreme of crimes") (footnote omitted); *id.*, at 226 (opinion of WHITE, J.) (rejecting the argument that "the death penalty, however imposed and for whatever crime, is cruel and unusual punishment"); *id.*, at 227 (BLACKMUN, J., concurring in the judgment). In no case since *Gregg* and its companion cases,[22] has this Court retreated from that position.[23] Recognizing the constitution-

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(counsel for petitioner asserting that so long as a defendant had the intent to kill, he need not actually have pulled the trigger in order to be subjected to capital punishment, and that even if he had pulled the trigger, he would not be subject to the death penalty absent a specific intent to kill).

[21] The Eighth Amendment provides that "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

[22] See *Roberts (Stanislaus)* v. *Louisiana*, 428 U. S. 325 (1976) (holding that Louisiana's mandatory death penalty statute violated the Eighth and Fourteenth Amendments); *Woodson* v. *North Carolina*, 428 U. S. 280 (1976) (holding that the State's mandatory death penalty statute violated the Eighth and Fourteenth Amendments); *Jurek* v. *Texas*, 428 U. S. 262 (1976) (upholding the Texas death penalty statute); *Proffitt* v. *Florida*, 428 U. S. 242 (1976) (upholding Florida's death penalty statute).

[23] In only one case since *Gregg* has this Court upheld a challenged death sentence. See *Dobbert* v. *Florida*, 432 U. S. 282 (1977) (holding that changes in the death penalty statute between the time of the murder and the sentencing did not amount to an *ex post facto* violation). In five cases, the Court vacated the death sentence because the sentencer could not or did not consider all mitigating factors proffered by the defendant. See *Roberts (Harry)* v. *Louisiana*, 431 U. S. 633 (1977) (*per curiam*); *Lockett* v. *Ohio*, 438 U. S. 586 (1978) (plurality opinion); *Bell* v. *Ohio*, 438 U. S. 637 (1978) (plurality opinion); *Green* v. *Georgia*, 442 U. S. 95 (1979) (*per curiam*); *Eddings* v. *Oklahoma*, 455 U. S. —— (1982) (adopting the reason-

ality of the death penalty, however, only marks the beginning of the inquiry, for Earl Enmund was not convicted of murder as it is ordinarily envisioned—a deliberate and premeditated, unlawful killing. Rather, through the doctrine of accessorial liability, the petitioner has been convicted of two murders that he did not specifically intend.[24] Thus, it is nec-

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ing of the *Lockett* plurality as the holding of the Court). In two cases, the Court reversed the judgments affirming the death sentences because the jury had been selected in violation of *Witherspoon* v. *Illinois*, 391 U. S. 510 (1968). See *Adams* v. *Texas*, 448 U. S. 38 (1980); *Davis* v. *Georgia*, 429 U. S. 122 (1976) (*per curiam*). In five other cases, the Court vacated death sentences for a variety of reasons unrelated to the proportionality of the punishment to the crime. See *Gardner* v. *Florida*, 430 U. S. 349 (1977) (plurality opinion) (due process violated when defendant had no chance to explain or deny information given to the sentencing judge); *Godfrey* v. *Georgia*, 446 U. S. 420 (1980) (plurality opinion) (reversing the death sentence because the aggravating circumstance relied upon by jury was not so tailored as to avoid arbitrary and capricious infliction of death penalty); *Beck* v. *Alabama*, 447 U. S. 625 (1980) (holding that death penalty may not be imposed where jury was precluded from considering lesser included non-capital offense, when evidence existed to support such a verdict); *Bullington* v. *Missouri*, 451 U. S. 430 (1981) (holding that Double Jeopardy Clause prevented imposition of death sentence upon retrial when jury had imposed life imprisonment at the first trial); *Estelle* v. *Smith*, 451 U. S. 454 (1981) (holding that admission of psychiatrist's testimony at the penalty phase of the capital trial violated the defendant's Fifth Amendment privilege against self-incrimination because he had not been told before his psychiatric examination that his statements could be used against him during the sentencing proceeding).

In *Coker* v. *Georgia*, 433 U. S. 584 (1977), the Court vacated a death sentence for a man who had been convicted of rape of an adult woman. Nevertheless, the Court made clear that the death penalty is not *per se* disproportionate to the crime of murder. See *e. g.*, *id.*, at 591 (opinion of WHITE, J.) ("It is now settled that the death penalty is not invariably cruel and unusual punishment within the meaning of the Eghth Amendment; . . . neither is it always disproportionate to the crime for which it is imposed"); *id.*, at 604 (opinion of BURGER, C. J.) (accepting "that the Eighth Amendment's concept of disproportionality bars the death penalty for minor crimes," but rejecting the argument that death is a disproportionate punishment for rape, much less murder).

[24] Strictly speaking, this Court cannot state unequivocally whether the

essary to examine the concept of proportionality as enunciated in this Court's cases to determine whether the penalty imposed on Earl Enmund is unconstitutionally disproportionate to his crimes.

A

The Eighth Amendment concept of proportionality was first fully expressed in *Weems* v. *United States*, 217 U. S. 349 (1910). In that case, defendant Weems was sentenced to fifteen years at hard labor for falsifying a public document. After remarking that "it is a precept of justice that punishment for crime should be graduated and proportioned to offense," *id.*, at 367, and after comparing Weems' punishment to the punishments for other crimes, the Court concluded that the sentence was cruel and unusual. *Id.*, at 381.

Not until two-thirds of a century later, in *Coker* v. *Georgia*, 433 U. S. 584 (1977), did the Court declare another punishment to be unconstitutionally disproportionate to the crime. Writing for himself and three other members of the Court, JUSTICE WHITE concluded that death is a disproportionate penalty for the crime of raping an adult woman. *Id.*, at 597.[25] In reaching this conclusion, the plurality was careful to inform its judgment "by objective factors to the maxi-

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petitioner specifically intended either to kill the Kerseys or to have them killed because the trial court made no findings on these issues. The trial court, however, did make the finding, not rejected by the Florida Supreme Court, that the petitioner's participation was not minor, but "major" in that he "planned the capital felony and actively participated in an attempt to avoid detection by disposing of the murder weapons." J. A. 32. Accordingly, I proceed on the assumption that the petitioner's only intent was to commit an armed robbery with his accomplices, the Armstrongs.

[25] JUSTICE POWELL concurred in the plurality's reasoning in concluding that "ordinarily" death was disproportionate for such a crime, but stopped short of a *per se* rule. *Id.*, at 601. JUSTICE BRENNAN and JUSTICE MARSHALL concurred in the judgment, adhering to their previously announced views that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments. See *id.*, at 600–601.

mum possible extent [by giving attention] to the public attitudes concerning a particular sentence—history and precedent, legislative attitudes, and the response of juries reflected in their sentencing decisions." *Id.*, at 592. The plurality's resort to objective factors was no doubt an effort to derive "from the evolving standards of decency that mark the progress of a maturing society" the meaning of the requirement of proportionality contained within the Eighth Amendment. *Trop* v. *Dulles*, 356 U. S. 86, 101 (1958) (opinion of Warren, C. J.).

The plurality noted that within the previous 50 years a majority of the States had never authorized death as a punishment for rape. More significantly to the plurality, only three of the 35 States that immediately reinstituted the death penalty following the Court's judgment in *Furman* v. *Georgia*, 408 U. S. 238 (1972) (invalidating nearly all state capital punishment statutes), defined rape as a capital offense.[28] The plurality also considered "the sentencing decisions that juries have made in the course of assessing whether capital punishment is an appropriate penalty for the crime being tried." 433 U. S., at 596. See *Gregg* v. *Georgia*, *supra*, 428 U. S., at 181 ("The jury also is a significant and reliable objective index of contemporary values because it is so directly involved") (opinion of Stewart, POWELL, and STEVENS, JJ.). From the available data, the plurality concluded that in at least 90% of the rape convictions since 1973, juries in Georgia had declined to impose the death penalty. 433 U. S., at 597.

Thus, the conclusion reached in *Coker* rested in part on the Court's observation that *both* legislatures *and* juries firmly rejected the penalty of death for the crime of rape. See *Woodson* v. *North Carolina, supra,* at 293 (opinion of Stewart, POWELL, and STEVENS, JJ.) (concluding that the State's mandatory death penalty statute violates the Eighth Amendment because the "two crucial indicators of evolving standards of decency respecting the imposition of punishment in our society—jury determinations and legislative determinations—both point conclusively to the repudiation of automatic death sentences").

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[28] In fact, two of those States, Louisiana and North Carolina, did not define rape as a capital felony when they reenacted their death penalty statutes following their invalidation in *Woodson* v. *North Carolina*, 428 U. S. 280 (1976), and *Roberts* v. *Louisiana*, 428 U. S. 325 (1976). See 433 U. S., at 594. Consequently, at the time *Coker* was decided only Georgia authorized the death penalty for the rape of an adult woman.

In addition to ascertaining "contemporary standards," the plurality opinion also considered qualitative factors bearing on the question whether the death penalty was disproportionate, for "the Constitution contemplates that in the end our own judgment will be brought to bear on the question of the acceptability of the death penalty under the Eighth Amendment." 433 U. S., at 597. The plurality acknowledged that a rapist is almost as blameworthy as a murderer, describing the crime of rape as "highly reprehensible, both in a moral sense and in its almost total contempt for the personal integrity and autonomy of the female victim." *Ibid.* Despite the enormity of the crime of rape, however, the Court concluded that the death penalty was "grossly out of proportion to the severity of the crime," *id.*, at 592, in part because the harm caused by a rape "does not compare with murder, which does involve the unjustified taking of human life." *Id.*, at 598.

Coker teaches, therefore, that proportionality—at least as regards capital punishment—requires not only an inquiry into contemporary standards as expressed by legislators and jurors, but also involves the notion that the magnitude of the punishment imposed must be related to the degree of the harm inflicted on the victim, as well as to the degree of the defendant's blameworthiness.[27] Moreover, because they turn on considerations unique to each defendant's case, these latter factors underlying the concept of proportionality are reflected in this Court's conclusion in *Lockett* v. *Ohio*, 438 U. S. 586, 605 (1978), that "individualized consideration [is] a constitutional requirement in imposing the death sentence." (opinion of BURGER, C. J.) (footnote omitted). See *id.*, at 613 (opinion of BLACKMUN, J.) ("the Ohio judgment in this case improperly provided the death sentence for a defendant who only aided and abetted a murder, without permitting any consideration by the sentencing authority of the extent of her involvement, or the degree of her *mens rea*, in the commission of the homicide").

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[27] The Court has conducted a less searching inquiry for punishments less than death. See *Rummel* v. *Estelle*, 445 U. S. 263 (1980) (upholding, against an Eighth Amendment challenge, a life sentence imposed under a

In sum, in considering the petitioner's challenge, the Court should decide not only whether the petitioner's sentence of death offends contemporary standards as reflected in the responses of legislatures and juries, but also whether it is disproportionate to the harm that the petitioner caused and to the petitioner's involvement in the crime, as well as whether the procedures under which the petitioner was sentenced satisfied the constitutional requirement of individualized consideration set forth in *Lockett*.

B

Following the analysis set forth in *Coker*, the petitioner examines the historical development of the felony murder rule, as well as contemporary legislation and jury verdicts in capital cases, in an effort to show that imposition of the death penalty on him would violate the Eighth Amendment. This effort fails, however, for the available data do not show that

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state recidivist statute); *Hutto* v. *Davis*, 455 U. S. —— (1982) (*per curiam*) (upholding, on the basis of *Rummel*, a 40-year sentence for two marijuana convictions). In *Rummel*, the Court expressly noted that, for purposes of Eighth Amendment analysis, those "decisions applying the prohibition of cruel and unusual punishments to capital cases are of limited assistance in deciding the constitutionality" of prison sentences. 445 U. S., at 272.

society has rejected conclusively the death penalty for felony murderers.

As the petitioner acknowledges, the felony murder doctrine, and its corresponding capital penalty, originated hundreds of years ago,[28] and was a fixture of English common law until 1957 when Parliament declared that an unintentional killing during a felony would be classified as manslaughter.[29] The common law rule was transplanted to the American Colonies, and its use continued largely unabated into the Twentieth Century, although legislative reforms often restricted capital felony murder to enumerated violent felonies.[30]

The petitioner discounts the weight of this historical precedent by arguing that jurors and judges widely resisted the application of capital punishment by acquitting defendants in felony murder cases or by convicting them of non-capital manslaughter.[31] The force of the petitioner's argument is speculative at best, however, for it is unclear what fraction of the jury nullification in this country resulted from dissatisfaction with the capital felony murder rule. Much of it, surely, was a reaction to the mandatory death penalty, and the failure of the common law and early state statutes to classify murder by degree. In fact, it was in response to juror attitudes toward capital punishment that most jurisdictions by the early part of this century replaced their mandatory death penalty statutes with statutes allowing juries the discretion to decide whether to impose or to recommend the death penalty. See *Woodson* v. *North Carolina*, *supra*, at 291–292 (opinion of Stewart, POWELL, and STEVENS, JJ.).[22] Thus, it simply is not possible to conclude that historically this country conclusively has rejected capital punishment for homicides committed during the course of a felony.

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[28] According to one source, at early common law most felonies were capital crimes, but attempts were punished as misdemeanors and accidental killings were not punishable at all. The felony murder rule was an effort to create felony liability for accidental killings caused during the course of an attempted felony. See American Law Institute, Model Penal Code, § 210.2, Comment, at 31, n. 74 (1980).

[29] See English Homicide Act of 1957, 5 & 6 Eliz. 2, c. 11. The English attitude toward capital punishment, as reflected in recent legislation, differs significantly from American attitudes as reflected in state legislation; in 1965, England abolished the death penalty for all murders. See Murder (Abolition of Death Penalty) Act of 1965, 8 Halibury's Stat. of England 541.

[30] See Comment, *The Constitutionality of Imposing the Death Penalty for Felony Murder*, 15 Hous. L. Rev. 356, 364–365 (1978); Alderstein, *Felony-Murder in the New Criminal Codes*, 4 Am. J. Crim. L. 249, 251–252 (1976).

[31] See, *e. g.*, Royal Commission on Capital Punishment 1949–1953, Report, 31–33 (reporting that application of the felony murder doctrine was limited to those cases in which the verdict could have been intentional murder); Law Revision Commission of the State of New York, 3d Annual Report, 665, 668 and n. 444 (1937). It is significant that the New York legislature rejected the Commission's recommendation of requiring some element of *mens rea*, and instead adopted a scheme giving jurors discretion

The petitioner and the Court turn to jury verdicts in an effort to show that, by present standards at least, capital punishment is grossly out of proportion to the crimes that the petitioner committed. Surveying all reported appellate court opinions since 1954 involving executions, the petitioner has found that of the 362 individuals executed for homicide, 339 personally committed the homicidal assault, and two others each had another person commit the homicide on his behalf. Only six persons executed were "non-triggermen."[23] A simi-

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to recommend life sentences. See N. Y. Laws 1937. c.67.

[22] The extent of jury nullification and the nearly complete repudiation of mandatory death penalty laws led a plurality of this Court to conclude that the "two crucial indicators of evolving standards of decency respecting the imposition of punishment in our society—jury determinations and and legislative enactments—both point conclusively to the repudiation of automatic death sentences." *Woodson* v. *North Carolina*, *supra*, at 293 (opinion of Stewart, POWELL, and STEVENS, JJ.). These factors supported the Court's conclusion that North Carolina's mandatory death penalty law violated the Eighth Amendment.

[23] See Brief for Petitioner, App. D. Moreover, the last non-triggerman was executed in 1955. By contrast, 72 rapist were executed between 1955

lar trend can be seen in the petitioner's survey of the current death row population.[24] Of the 739 prisoners for whom sufficient data are available, only 40 did not participate in the homicidal assault, and of those, only three (including the petitioner) were sentenced to death absent a finding that they had collaborated with the killer in a specific plan to kill. Brief for Petitioner at 35–36. See also Reply Brief for Petitioner, App. (showing that of the 45 felony murderers currently on death row in Florida, 36 were found by the state supreme court or a trial court to have had the intent to kill; in 8 cases, the state courts made no finding, but the defendant was the triggerman; and in 1, the petitioner's case, the defendant was not the triggerman, and there was no finding of intent to kill).

Impressive as these statistics are at first glance, they cannot be accepted uncritically. So stated, the data do not reveal the number or fraction of homicides that were charged as felony murders, or the number or fraction of cases in which the State sought the death penalty for an accomplice guilty of felony murder. Consequently, we cannot know the fraction of cases in which juries rejected the death penalty for accomplice felony murder. Moreover, as JUSTICE BLACKMUN pointed out in his concurring opinion in *Lockett* v. *Ohio*, *supra*, at 616 n. 2, much of these data classify defendants by whether they "personally committed a homicidal assault," and do not show the fraction of capital defendants who were shown to have an intent to kill. While the petitioner relies on the fact that he did not pull the trigger, his principal argument is, and must be, that death is an unconstitutional penalty absent an intent to kill, for otherwise, defendants who hire others to kill would escape the death penalty. See n. 20 *supra*. Thus, the data he presents are not entirely relevant.

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and this Court's 1977 decision in *Coker*. Brief for Petitioner, at 34–35.

[24] See Brief for Petitioner, App. E; NAACP Legal Defense and Education Fund, Inc., Death Row U. S. A. (Oct. 20, 1981).

Even accepting the petitioner's facts as meaningful, they may only reflect that sentencers are especially cautious in imposing the death penalty, and reserve that punishment for those defendants who are sufficiently involved in the homicide, whether or not there was specific intent to kill.

Finally, as the petitioner acknowledges, the jury verdict statistics cannot be viewed in isolation from state death penalty legislation. The petitioner and the Court therefore review recent legislation in order to support the conclusion that society has rejected capital felony murder. Of the 35 States that presently have a death penalty, however, fully 32 authorize a sentencer to impose a death sentence for a death that occurs during the course of a robbery.[35] The States are not uniform in delimiting the circumstances under which the death penalty may be imposed for felony murder, but each state statute can be classified as one of three types. The first category, containing 21 statutes, includes those States that permit imposition of the death penalty for felony murder even though the defendant did not commit the homicidal act, and even though he had no actual intent to kill.[36] Three additional States, while requiring some finding of intent, do not require the intent to kill that the petitioner believes is constitutionally mandated before the death sentence may be imposed.[27] The second category, containing seven statutes, in-

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[35] Only Missouri, New Hampshire, and Pennsylvania define felony murder as a crime distinct from capital murder. See Mo. Rev. Stat. §§ 565.001, 565.003, 565.008(2) (1979); N. H. Rev. Stat. Ann. §§ 630:1, 630:1-a(I)(b)(2), 630:1-a(III) (1974); Pa. Stat. Ann., Tit. 18, §§ 2502(a), (b), (d), 1102(b) (Supp. 1981). One exception to the New Hampshire scheme is § 630:1(I)(b), which includes in the definition of capital murder a death caused "knowingly" in the course of a kidnapping.

[36] See Ariz. Rev. Stat. Ann. §§ 13-1105(A)(2), (C) (West 1981); Cal. Penal Code §§ 189, 190 (West Supp. 1982); Colo. Rev. Stat. §§ 18-3-102(1)(b), 18-1-105(1)(a) (1978 & Supp. 1981); Conn. Gen. Stat. §§ 53a-54b, 53a-54c, 53a-35a(1) (Supp. 1982); Fla. Stat. §§ 782.04(1)(a), 775.082(1) (1976 & Supp. 1982); Ga. Code § 26-1101(b), (c) (1977); Idaho Code §§ 18-4003(d), 4004 (1979); Ind. Code §§ 35-42-1-1(2), 35-50-2-3(b) (1979); Miss. Code Ann. §§ 97-3-19(2)(e), 97-3-21 (1972 & Supp. 1981); Mont. Code Ann. §§ 45-5-102(1)(b), (2) (1981); Neb. Rev. Stat. §§ 28-303(2), 28-105(1) (1979); Nev. Rev. Stat. §§ 200.030(1)(b), 200.030(4)(a) (1981); N. M. Stat. Ann. §§ 30-2-1(A)(2), 31-18-14(A),

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31-20A-5 (Supp. 1981); N. C. Gen. Stat. § 14-17 (1981); Okla. Stat., Tit. 21, §§ 701.7(B), 701.9(A) (Supp. 1981); S. C. Code §§ 16-3-10, 16-3-20(1) (1976 & Supp. 1981); S. D. Codified Laws §§ 22-16-4, 22-16-12, 22-6-1(1), 22-3-3 (1979 & Supp. 1981); Tenn. Code Ann. § 39-2402(a), (b) (Supp. 1981); Vt. Stat. Ann., Tit. 13, §§ 2301, 2303(b), (c) (1974 & Supp. 1981); Wash. Rev. Code §§ 9A.32.030(1)(c)(1), 9A.32.040(1) (1977 & Supp. 1982); and Wyo. Stat. §§ 6-4-101(a), (b) (1977).

Three of these States, Colorado, Connecticut, and Washington, provide that it is an affirmative defense to the capital crime if the accomplice did not "in any way solicit, request, command, importune, cause or aid the commission" of the homicidal act; was not armed with a deadly weapon and had no reason to believe that his co-felons were so armed; and did not engage or intend to engage, and had no reason to believe that his co-felons would engage in conduct "likely to result in death or serious bodily injury." See Colo. Rev. Stat. § 18-3-102 (2) (1978); Conn. Gen. Stat. § 53a-54c (Supp. 1982); Wash. Rev. Code § 9A.32.030(1)(c) (1977). Colorado also prevents imposition of the death penalty if the defendant's role, though sufficient to establish guilt, was "relatively minor." Colo. Rev. Stat. § 16-11-103(5)(d) (1978). Even if they were available under the Florida statute, these provisions would have been of no help to the petitioner since the trial court found that there were no mitigating circumstances, in part because Enmund's role in the capital felony was not minor. See Fla. Stat. § 921.141(6)(d). The state supreme court expressly affirmed the trial court's finding of no mitigating circumstances, and therefore the finding that the petitioner's role was not minor. 399 So. 2d, at 1373.

Of course, not all of the statutes listed above are identical. Several of them provide that robbery murder is a capital felony, but require proof of additional aggravating circumstances, *e. g.*, the defendant had been convicted previously of a violent felony, or the victim was a correctional officer, before the death penalty can be imposed. See *e. g.*, Okla. Stat., Tit. 21, § 701.12 (Supp. 1981); N. M. Stat. Ann. §§ 30-2-1(A)(2), 31-18-14(A), 31-20A-5 (Supp. 1981). Others, like the Florida statute, define robbery murder as a capital offense and use the robbery as an aggravating circumstance. The common thread in all of these statutes, however, is that the defendant need not have the intent to kill in order to be subject to the death penalty. The Court's additional subdivision of this group of statcludes those States that authorize the death penalty only if the defendant had the specific intent (or some rough equivalent) to kill the victim.[27] The third class of statutes, from only three States, restricts application of the death penalty to those felony murderers who actually commit the homicide.[28]

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utes, see *ante*, at 8–10 and nn. 10–13, serves only to obscure the point that 21 States permit imposition of the death penalty even though the defendant did not acutally kill, and had no intent to kill.

[27] See Ark. Stat. Ann. §§ 41–1501(1)(a), (2), (3) (1977) (a capital crime if death occurs during commission of the felony "under circumstances manifesting extreme indifference to the value of human life"); Del. Code Ann., Tit. 11, §§ 636(a)(6), 636(b), 4209(a) (1974) (a capital crime only if the death is caused "with criminal negligence"); Ky. Rev. Stat. § 507.020(1)(b), (2) (Supp. 1980) (defendant must "cause the death of another person" under "circumstances manifesting extreme indifference to human life [and while] wantonly engag[ing] in conduct which creates a grave risk of death to another person"). It is an affirmative defense to capital felony murder in Arkansas if the "defendant did not commit the homicide act or in any way solicit, command, induce, procure, counsel, or aid its commission." Ark. Stat. Ann. § 41–1501(2) (1977).

At oral argument, counsel for petitioner stated that "the determining factor is the intent to take life, conscious purpose to take life." Tr. Oral Arg. (Mar. 23, 1982), at 18. Under the petitioner's proposed standard, these statutes would be unconstitutional.

[28] See Ala. Code 13A–2–23, 13A–5–40(a)(2), (b), (c), (d) 13A–6–2(a)(1) (1977 & Supp. 1981) (the accomplice is not guilty of capital murder unless the killing is intentional, and the accomplice had "intent to promote or assist the commission" of the murder); Ill. Rev. Stat., ch. 38, ¶ 9–1(a)(3), (b)(6) (1979) (a capital crime only if the defendant killed intentionally or with knowledge that his actions "created a strong probability or death or great bodily harm"); La. Rev. Stat. Ann. § 14:30(1) (West 1982) (defendant is guilty of capital murder only if he had "specific intent to kill or inflict great bodily harm"); Ohio Rev. Code Ann. §§ 2903.01(B), (C), (D), 2929.02(A), 2929.04(A)(7) (1982) (accomplice is not guilty of the capital crime unless he "purposely caused" the death and was "specifically found to have intended to cause the death of another"; if defendant is not the "principal offender," the death penalty is precluded unless he "committed the aggravated murder with prior calculation and design"); Tex. Penal Code Ann. §§ 12.31, 19.03(a)(2), 19.02(a)(1) (1974) (defendant is guilty of capital murder only if he "intentionally or knowingly" caused death during the

The Court's curious method of counting the States that authorize imposition of the death penalty for felony murder cannot hide the fact that 24 States permit a sentencer to impose the death penalty even though the felony murderer has neither killed nor intended to kill his victim. While the Court acknowledges that nine state statutes follow the Florida death penalty scheme, see note 5, *ante*, it also concedes that 15 other statutes permit imposition of the death penalty where the defendant neither intended to kill or actually killed the victims. See note 8, *ante* (Arkansas, Deleware, and Kentucky); note 9, *ante* (New Mexico); note 10, *ante* (Colorado), note 11, *ante* (Vermont); note 12, *ante* (Arizona, Connecticut, Indiana, Montana, Nebraska, and North Carolina); note 13, *ante* (Idaho, Oklahoma, and South Dakota). Not all of the statutes list the same aggravating circumstances. Nevertheless, the question before the Court is not whether a particular species of death penalty statute is unconstitutional, but whether a scheme that permits imposition of the death penalty, absent a finding that the defendant either killed or intended to kill the victims, is unconstitutional. In short, the Court's peculiar statutory analysis cannot withstand closer scrutiny.

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course of the robbery); Utah Code Ann. § 76-5-202(1)(d), (2), 76-3-206(1) (1978) (defendant is guilty of capital murder only if he "intentionally or knowingly" caused the death during the course of the robbery); and Va. Code § 18.2-31(d), 18.2-10(a) (Supp. 1981) (capital murder only if killing is "willful, deliberate and premeditated").

[illegible] See Ill. Rev. Stat., ch. 38, ¶ 9-1(a)(3), (b)(6) (1979) (a capital crime only if the defendant actually killed the victim and the defendant killed intentionally or with knowledge that his actions "created a strong probability or death or great bodily harm"); Md. Ann. Code, Art. 27, § 410, 412(b), 413(d)(10), (e)(1) (1982) (except in cases of murder for hire, only principal in the first degree subject to the death penalty); Va. Code §§ 18.2-31(d), 18.2-10(a), 18.2-18 (Supp. 1981) (except in cases of murder for hire, only the immediate perpetrator of the homicide, and not accomplice before the fact or principal in the second degree, may be tried for capital murder). Note that Illinois and Virginia also require an intent to kill. See n. 38

Thus, in nearly half of the States, and in two-thirds of the States that permit the death penalty for murder, a defendant who neither killed the victim nor specifically intended that the victim die may be sentenced to death for his participation in the robbery-murder. Far from "weigh[ing] very heavily on the side of rejecting capital punishment as a suitable penalty for" felony murder, *Coker* v. *Georgia*, *supra*, at 596, these legislative judgments indicate that our "evolving standards of decency" still embrace capital punishment for this crime. For this reason, I conclude that the petitioner has failed to meet the standards in *Coker* and *Woodson* that the "two crucial indicators of evolving standards of decency . . . —jury determinations and legislative enactments—*both point conclusively* to the repudiation" of capital punishment for felony murder. 428 U. S., at 293 (emphasis added). In short, the death penalty for felony murder does not fall short of our national "standards of decency."

C

As I noted earlier, the Eighth Amendment concept of proportionality involves more than merely a measurement of contemporary standards of decency. It requires in addition that the penalty imposed in a capital case be proportional to the harm caused and the defendant's blameworthiness. Critical to the holding in *Coker*, for example, was that "in terms of moral depravity and of the injury to the person and to the public, [rape] does not compare with murder, which . . . involve[s] the unjustified taking of human life." 433 U. S., at 598.

Although the Court disingenuously seeks to characterize Enmund as only a "robber," *ante*, at 15, it cannot be disputed that he is responsible, along with Sampson and Jeanette Armstrong, for the murders of the Kerseys. There is no dispute that their lives were unjustifiably taken, and that the

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supra.

petitioner, as one who aided and abetted the armed robbery, is legally liable for their deaths.[40] Quite unlike the defendant in *Coker*, the petitioner cannot claim that the penalty imposed is "grossly out of proportion" to the harm for which he admittedly is at least partly responsible.

The Court's holding today is especially disturbing because it makes intent a matter of federal constitutional law, requiring this Court both to review highly subjective definitional problems customarily left to state criminal law and to develop an Eighth Amendment meaning of intent. As JUSTICE BLACKMUN pointed out in his concurring opinion in *Lockett*, the Court's holding substantially "interfere[s] with the States' individual statutory categories for assessing legal guilt." 438 U. S., at 616.[41] See also *id.*, at 635–636 (opinion of REHNQUIST, J.) (rejecting the idea that intent to kill must be proven before the State can impose the death penalty). Although the Court's opinion suggests that intent can be ascertained as if it were some historical fact, in fact it is a legal concept, not easily defined. Thus, while proportionality requires a nexus between the punishment imposed and the defendant's blameworthiness, the Court fails to explain why the Eighth Amendment concept of proportionality requires rejection of standards of blameworthiness based on other levels of intent, such as, for example, the intent to commit an armed robbery coupled with the knowledge that armed robberies involve substantial risk of death or serious injury to other persons. Moreover, the intent-to-kill requirement is crudely crafted; it fails to take into account the complex picture of the defendant's knowledge of his accomplice's intent and whether he was armed, the defendant's contribution to the planning and success of the crime, and the defendant's actual participation during the commission of the crime. Under the circumstances, the determination of the degree of blameworthiness is best left to the sentencer, who can sift through the facts unique to each case. Consequently, while the type of *mens rea* of the defendant must be considered carefully in assessing the proper penalty, it is not so critical a factor in determining blameworthiness as to require a finding of intent to kill in order to impose the death penalty for felony murder.

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[40] The Court's attempt to downplay the significance of Enmund's role in the murders, see n. 2, *ante*, does not square with the facts of this case. The trial court expressly found that because Enmund had planned the robbery, his role was not minor, and that therefore no statutory mitigating circumstances applied. The Florida Supreme Court affirmed the finding of no mitigating circumstances, thereby affirming the underlying factual predicate—Enmund had planned the armed robbery. Moreover, even Enmund's trial counsel conceded at the sentencing hearing that Enmund initiated the armed robbery and drove the getaway car. See n. 10 *supra*.

The Court misreads the opinion below in suggesting that the state supreme court deduced from the *sentencing hearing* that Enmund's only participation was as the getaway driver. In fact, the court made that statement with respect to the *guilt* phase of the trial. As I mentioned above, Enmund's counsel conceded at the sentencing hearing that Enmund had initiated the armed robbery.

[41] It is not true, as the petitioner suggests, that an intent to kill requirement would not interfere with the State's substantive categories of murder. Prohibiting the death penalty for accomplice felony murder would create a category of murder between capital murder, for which the death penalty is permitted, and the next statutory degree, for which some term of years (typically less than life imprisonment) is imposed.

In sum, the petitioner and the Court have failed to show that contemporary standards, as reflected in both jury determinations and legislative enactments, preclude imposition of the death penalty for accomplice felony murder. Moreover, examination of the qualitative factors underlying the concept of proportionality do not show that the death penalty is disproportionate as applied to Earl Enmund. In contrast to the crime in *Coker*, the petitioner's crime involves the very type of harm that this Court has held justifies the death penalty. Finally, because of the unique and complex mixture of facts involving a defendant's actions, knowledge, motives, and participation during the commission of a felony murder, I believe that the factfinder is best able to assess the defendant's blameworthiness. Accordingly, I conclude that the death penalty is not disproportionate to the crime of felony mrder, even though the defendant did not actually kill or intend to kill his victims.[42]

III

Although I conclude that the death penalty is not disproportionate to the crime of felony murder, I believe that, in light of the state supreme court's rejection of critical factual findings, our previous opinions require a remand for a new sentencing hearing.[43] Repeatedly, this Court has emphasized that capital sentencing decisions must focus "on the circumstances of each individual homicide and individual defendant." *Proffitt* v. *Florida*, 428 U. S. 242, 258 (1976) (opinion of Stewart, POWELL, and STEVENS, JJ.). In striking down the mandatory capital punishment statute in *Woodson* v. *North Carolina*, *supra*, at 304, a plurality of the Court wrote

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[42] The petitioner and the Court also contend that capital punishment for felony murder violates the Eighth Amendment because it "makes no measurable contribution to acceptable goals of punishment." *Coker* v. *Georgia*, *supra*, at 592. In brief, the petitioner and the Court reason that since he did not specifically intend to kill the Kerseys, since the probability of death during an armed robbery is so low, see American Law Institute, Model Penal Code § 210.2, Comment at 38 n. 96 (1980) (concluding from several studies that a homicide occurs in about one-half of one percent of all robberies), and since the death penalty is so rarely imposed on nontriggermen, capital punishment could not have deterred him or anyone else from participating in the armed robbery. The petitioner and the Court also reject the notion that the goal of retribution might be served because his "moral guilt" is too insignificant.

At their core, these conclusions are legislative judgments decisions regarding the efficacy of capital punishment as a tool in achieving retributive justice and deterring violent crime. Surely, neither the petitioner nor the Court has shown that capital punishment is ineffective as a deterrent for his crime; the most the Court can do is speculate as to its effect on other felony murderers and rely on "competent observers" rather than legislative judgments. See *ante*, at 17. Moreover, the decision of whether or not a particular punishment serves the admittedly legitimate goal of retribution seems uniquely suited to legislative resolution. Because an armed robber takes a serious risk that someone will die during the course of his crime, and because of the obviousness of that risk, we cannot conclude that the death penalty "makes no measurable contribution to acceptable goals of punishment."

[43] Apparently, the Court also intends that the case be remanded for a new death sentence hearing, consistent, of course, with its holding today.

> "A process that accords no significance to relevant facets of the character and record of the individual offender or the circumstances of the particular offense excludes from consideration in fixing the ultimate punishment of death the possibility of compassionate or mitigating factors stemming from the diverse frailties of humankind. It treats all persons convicted of a designated offense not as uniquely individual human beings, but as members of a faceless, undifferentiated mass to be subjected to the blind infliction of the penalty of death.
>
> . . . . .
>
> "[W]e believe that in capital cases the fundamental respect for humanity underlying the Eighth Amendment . . . requires consideration of the character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death." (citation omitted).

In *Lockett* v. *Ohio*, *supra*, at 605, a plurality of this Court concluded

> "Given that the imposition of death by public authority is so profoundly different from all other penalties, we cannot avoid the conclusion that an individualized decision is essential in capital cases. The need for treating each defendant in a capital case with that degree of respect due the uniqueness of the individual is far more important than in noncapital cases. . . . The nonavailability of corrective or modifying mechanisms with respect to an

> executed capital sentence underscores the need for individualized consideration as a constitutional requirement in imposing the death sentence." (footnote omitted).

Accordingly, "the sentencer, in all but the rarest kind of capital case, [may] not be precluded from considering, *as a mitigating factor*, any aspect of the defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." (footnotes omitted). *Id.*, at 604. See *id.*, at 613 (opinion of BLACKMUN, J.) (concluding that the Ohio capital sentencing statute is unconstitutional because it "provided the death sentence for a defendant who only aided and abetted a murder, without permitting any consideration by the sentencing authority of the extent of her involvement, or the degree of her *mens rea*, in the commission of the homicide"); *Green* v. *Georgia*, 442 U. S. 95, 97 (1979) (*per curiam*) (holding that the exclusion of evidence, from the capital sentencing proceeding, that the petitioner was not present when the victim was killed violated due process because "the excluded testimony was highly relevant to a critical issue in the punishment phase of the trial"); *Eddings* v. *Oklahoma*, 455 U. S. —— (1982) (adopting the plurality's rule in *Lockett*). Thus, in deciding whether or not to impose capital punishment on a felony murderer, a sentencer must consider any relevent evidence or arguments that the death penalty is inappropriate for a particular defendant because of his relative lack of *mens rea* and his peripheral participation in the murder. Because of the peculiar circumstances of this case, I conclude that the trial court did not give sufficient consideration to the petitioner's role in the crimes, and thus did not consider the mitigating circumstances proffered by the defendant at his sentencing hearing.[44]

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[44] Although the petitioner challenges the constitutionality of his sentencing hearing, he does not challenge the constitutionality of the statutory

In sentencing the petitioner, the trial court found four statutory aggravating circumstances: the petitioner had been convicted previously of a violent felony; the murders had been committed during the course of a robbery; the murders had been committed for pecuniary gain; and the murders were especially heinous, atrocious, or cruel. In its factual findings, the trial court stated that the "armed robbery . . . was planned ahead of time by the defendant Enmund," J. A. 30, and that he had shot each of the victims while they lay prone in order to eliminate them as witnesses. J. A. 30–31. The court expressly found that "*none* of the statutory mitigating circumstances applied" to the petitioner. J. A. 32 (emphasis in original). Among other findings, the court rejected Enmund's claim that his participation in the murders had been "relatively minor," and found instead that "his participation in the capital felony was major. The defendant Enmund planned the capital felony and actively participated in an attempt to avoid detection by disposing of the murder weapons." *Ibid.*

The Florida Supreme Court rejected these findings in part. The court noted that there "was no direct evidence at trial that Earl Enmund was present at the back door of the Kersey home when the plan to rob the elderly couple led to their being murdered." 399 So. 2d, at 1370. Rather,

> "the only evidence of the degree of his participation is the jury's likely inference that he was the person in the car by the side of the road near the scene of the crimes. The jury could have concluded that he was there, a few hundred feet away, waiting to help the robbers escape with the Kerseys' money." *Ibid.*

Consequently, the court expressly rejected the trial court's finding that Enmund personally had committed the homicide.

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capital sentencing procedures. See *Proffitt* v. *Florida*, 428 U. S. 242 (1976) (upholding the Florida scheme).

Reviewing the aggravating circumstances, the supreme court consolidated two of them, and rejected the trial court's conclusion that the murders had been "heinous, atrocious, or cruel," since the evidence showed that the Armstrongs had killed the Kerseys in a gun battle arising from Mrs. Kersey's armed resistance, and not that the petitioner had killed them in an effort to eliminate them as witnesses. See *Armstrong* v. *State*, 399 So. 2d, at 963.

Although the state statutory procedures did not prevent the trial judge from considering any mitigating circumstances,[45] the trial judge's view of the facts, in part rejected by the state supreme court, effectively prevented such consideration. In his erroneous belief that the petitioner had shot both of the victims while they lay in a prone position in order to eliminate them as witnesses, the trial judge necessarily rejected the only argument offered in mitigation—that the petitioner's role in the capital felonies was minor, undeserving of the death penalty, because the petitioner was in the car when the fatal shots were fired. This fundamental misunderstanding of the petitioner's role in the crimes prevented the trial court from considering the "circumstances of the particular offense" in imposing sentence. *Woodson* v. *North Carolina*, *supra*, at 304. Moreover, this error was not so insignificant that we can be sure its effect on the sentencing judge's decision was negligible.[46] Accordingly, I would vacate the decision below insofar as it affirms the death sentence, and remand the case for a new sentencing hearing.

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[45] See *Songer* v. *State*, 365 So. 2d 696, 700 (Fla. 1978) (holding that Fla. Stat. § 921.141(6), which lists mitigating circumstances, does not restrict the sentencer's consideration of mitigating circumstances to those expressly listed in the statute); *Shriner* v. *State*, 386 So. 2d 525, 533 (Fla. 1980), cert. denied, —— U. S. —— (1981); *Enmund* v. *State*, *supra*, at 1371. As noted above, the petitioner offered no additional evidence at the sentencing hearing in mitigation of his crime. See R. 1677. His counsel argued, however, that the petitioner did not deserve the death penalty because his role in the crime was relatively minor. R. 1683–1685.

[46] The Florida Supreme Court's opinion fails to correct this error either by remanding for new sentencing or by evaluating the impact of the trial

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court's fundamental misperception of the petitioner's role in the killings. Rather, the court simply repeats three times, without any discussion of the evidence, that there are "no mitigating circumstances." 399 So. 2d, at 1373. In light of the court's dramatically different factual findings, this review is inadequate to satisfy the *Lockett* principle.

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SUPREME COURT OF THE UNITED STATES

Syllabus

CALIFORNIA EX REL. STATE LANDS COMMISSION v. UNITED STATES

ON CROSS MOTIONS FOR JUDGMENT

No. 89, Original. Argued March 29, 1982—Decided June 18, 1982

Held: The United States, not California, has title to oceanfront land created through accretion, resulting from construction of a jetty, to land owned by the United States on the coast of California. Pp. 5–14.

(a) A dispute over accretions to oceanfront land where title rests with or was derived from the Federal Government is to be determined by federal law. *Hughes* v. *Washington*, 389 U. S. 290; *Wilson* v. *Omaha Indian Tribe*, 442 U. S. 653. Under federal law, accretion, whatever its cause, belongs to the upland owner. Pp. 5–9.

(b) This is not a case where, as a matter of choice of law, state law should be borrowed and applied as the federal rule for deciding the substantive legal issue. Congress addressed the issue of accretions to federal land in the Submerged Lands Act, which vested title in the States to the lands underlying the territorial sea and confirmed the title of the States to the tidelands up to the line of mean high tide, but which in § 5 withheld from the grant to the States all "accretions" to coastal lands acquired or reserved by the United States. In light of this latter provision, borrowing for federal law purposes a state rule that would divest federal ownership is foreclosed. Moreover, this is not a case in which federal common law must be created, since it has long been settled under federal law that the right to future accretions is an inherent and essential attribute of the littoral or riparian owner. Pp. 9–11.

(c) Only land underneath inland waters was included in the initial grant to the States under the equal-footing doctrine, *California* v. *United States*, 332 U. S. 19, and hence California cannot properly claim that title to the land in question here was vested in the State by that doctrine and confirmed by the Submerged Lands Act. The latter Act was a constitutional exercise of Congress' power to dispose of federal property and "did not impair the validity" of the *California* v. *United*

Ju6. 8/6:

States decision, *United States* v. *Louisiana*, 363 U. S. 1, 7, 20. To accept California's argument would require rejecting not only *Hughes*, *supra*, but also the established federal rule that accretions belong to the upland owner. Pp. 11–12.

(d) Section 2(a)(3) of the Submerged Lands Act, defining "lands beneath navigable waters" that fall within the Act's general grant to the States as including all "made" lands that formerly were lands beneath navigable water, does not apply to the gradual process by which sand accumulated along the shore, although caused by a jetty. To the extent that accretions are to be considered "made" land, they would fall within the reservation by the United States in the Act of "all lands filled in, built up, or otherwise reclaimed by the United States for its use." In any event, § 5(a) of the Act expressly withholds from the grant to the States all "accretions" to lands reserved by the United States. Pp. 12–14.

(e) Section 3(a) of the Submerged Lands Act, confirming the title of persons who, on June 5, 1950, were entitled to lands beneath navigable water "under the law of the respective states in which the land is located," means nothing more than that state law determines the proper beneficiary of the grant of land under the Act. Federal law determines the scope of the grant under the Act in the first instance. P. 14.

The United States' motion for judgment on the pleadings granted.

WHITE, J., delivered the opinion of the Court, in which **BURGER**, C. J., and **BRENNAN**, **MARSHALL**, **BLACKMUN**, and **POWELL**, JJ., joined. **REHNQUIST**, J., filed an opinion concurring in the judgment, in which **STEVENS** and **O'CONNOR**, JJ., joined.

NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D.C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

SUPREME COURT OF THE UNITED STATES

No. 89 Original

STATE OF CALIFORNIA, EX REL., STATE LANDS COMMISSION, PLAINTIFF *v.* UNITED STATES

ON CROSS MOTIONS FOR JUDGMENT

[June 18, 1982]

JUSTICE WHITE delivered the opinion of the Court.

The issue before the Court is the ownership of oceanfront land created through accretion to land owned by the United States on the coast of California. The decision turns on whether federal or state law governs the issue.

I

From the time of California's admission to the Union in 1850, the United States owned the upland on the north side of the entrance channel to Humboldt Bay, California. In 1859 and 1871, the Secretary of the Interior ordered that certain of these lands, which fronted on the Pacific Ocean, the channel, and Humboldt Bay be reserved from public sale.[1] Since that time the land has been continuously possessed by the United States and used as a Coast Guard Reservation. The Pacific shoreline along the Coast Guard site remained substantially unchanged until the turn of the century when the United States began construction of two jetties at the entrance to Humboldt Bay.[2] The jetty constructed on the north side of the entrance resulted in fairly rapid accretion on the ocean side of the Coast Guard Reservation, so that formerly submerged lands became uplands.[3] One hundred and eighty-four acres of upland were created by the seaward movement of the ordinary high-water mark. This land, which remains barren save for a watchtower, is the subject of the dispute in this case.

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[1] Secretarial Order, December 27, 1859; Secretarial Order, August 19, 1871. See Exhibit C to Exhibits in Support of California's Motion for Leave to File Complaint.

[2] Construction of the jetties commenced on the South Spit in 1889 and on the North Spit in 1891. U. S. Army Corps of Engineers, San Francisco

The controversy arose in 1977 when the Coast Guard applied for permission from California to use this land to construct the watchtower.[4] At this time it became evident that both California and the United States asserted ownership of

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District, Survey Report on Humboldt Bay, California, App. I, "Shoreline Changes" at 2–3, 8–9 (February 10, 1950), Exhibit D, (hereafter cited as "Corps Report"). The north jetty was a massive work, having a total length of 7,500 feet.

[3] The United States and California agree that that the seaward shift of the shoreline was caused by the construction of the jetties. A study by the Army Corps of Engineers found:

"With the inauguration of jetty construction in 1890, there began a series of interruptions in normal littoral transport [of sand]. With each increment in length of the jetties the [Humboldt] bar was pushed seaward. Consequent decrease in offshore depths caused the shore to advance on each side of the inlet." Exhibit D, Corps Report, at par. 21, p. 9.

After jetty construction,

". . . the Humboldt bar . . . shifted and reformed seaward of its 1870 position, and the ocean high-water shore line along the north spit . . . shifted seaward. The seaward advance of the north spit shore line was most pronounced upon reconstruction of the north jetty in 1917." *Id.* at para. 25, p. 9.

[4] California does not contend that having applied for a state permit, the United States is estopped from asserting its claim to ownership of the disputed land. Tr. of Oral Arg. at 5–6. Such an argument is foreclosed by *United States* v. *California*, 332 U. S. 19, 39–40 (1947): "[O]fficers who have no authority at all to dispose of Government property cannot by their conduct cause the Government to lose its valuable rights by their acquiescence, laches, or failure to act." See also *United States* v. *San Francisco*, 310 U. S. 16, 31–32 (1940); *Utah* v. *United States*, 284 U. S. 534, 545–546 (1932).

the land. The United States eventually built the watchtower without obtaining California's permission.[5] Invoking our original jurisdiction, California then filed this suit to quiet title to the subject land.[6] We granted leave for California to file a Bill of Complaint. —— U. S. ——.

California alleges that upon its admission to the Union on September 9, 1850, Act of September 9, 1850, 9 Stat. 452, and by confirmation in the Submerged Lands Act, 43 U. S. C. §§ 1311 *et seq.*, California became vested with absolute title to the tidelands and the submerged lands upon which, after construction of the jetties, alluvion was deposited, resulting in formation of the subject land. Because the accretion formed on sovereign state land, California maintains that its law should govern ownership. Under California law, a distinction is drawn between accretive changes to a boundary caused by natural forces and boundary changes caused by the construction of artificial objects. For natural accretive changes, the upland boundary moves seaward as the alluvion is deposited, resulting in a benefit to the upland owner. *City of Los Angeles* v. *Anderson*, 206 Cal. 662, 667 275 P. 789, 791 (1929). When accretion is caused by construction of artificial works, however, the boundary does not move but becomes fixed at the ordinary high water mark at the time the artificial influence is introduced. *Carpenter* v. *City of Santa Monica*, 63 Cal.App. 2d 772, 794 147 P. 2d 964, 975 (1944). It is not disputed that the newly formed land in controversy was created by the construction of the jetty. Therefore, if state law governs, California would prevail.

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[5] In May, 1978, California transmitted a proposed permit to the United States to allow construction of the watchtower. See Exhibit F. A few days later, the Bureau of Land Management of the Department of the Interior formally advised the Coast Guard and the California Commission that the United States claimed the disputed acreage as accretion. Letter of June 5, 1978, attached to Exhibit G. The proposed permit was never executed.

[6] Disputes between a state and the United States over ownership of property are fully within our original jurisdiction over cases in "which a State shall be Party," Art. III, § 2, cl. 2. Although our jurisdiction over this matter is concurrent with that of the district courts, *California* v. *Arizona*, 440 U. S. 59, 65 (1979) 28 U. S. C. § 1251(b)(2), we have previously indicated that coastal boundary disputes are appropriately brought as original actions in this Court. *United States* v. *Alaska*, 422 U. S. 184, 186 n. 2 (1975).

The United States has waived its immunity to suit in actions brought against it to quiet title to land. 28 U. S. C. § 1346(f). See *California* v. *Arizona*, *Supra*, at 65–68.

By its answer, and supporting memoranda, the United States contends that the formerly submerged lands were never owned by California before passage of the Submerged Lands Act in 1953, and that the disputed land was not granted to California by the Act. The United States also submits that the case is governed by federal rather than state law and that under long-established federal law, accretion, whatever its cause, belongs to the upland owner. *Jones* v. *Johnston*, 18 How. 150 156 (1856); *County of St. Clair* v. *Lovingston*, 23 Wall. 46 66 (1874); *Jefferis* v. *East Omaha Land Co.*, 134 U. S. 178 189–193 (1890); *Beaver* v. *United States*, 350 F. 2d 4 10–11 (CA9 1965).[7] If such federal law controls, title to the deposited land vested in the United States as the accretions formed.

Recognizing that the choice-of-law issue was clearly drawn, California moved for summary judgment and the United States moved for judgment on the pleadings. No essential facts being in dispute, a special master was not appointed and the case was briefed and argued. We conclude that federal law governs the decision in this case and that the land in dispute is owned by the United States.

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[7] California's claim that *Wilson* v. *Omaha Indian Tribe*, 442 U. S. 653, 672 (1979), determined that there was no "federal common law" of accretion and avulsion, is a misunderstanding of that decision. We said only that "[t]he federal law applied in boundary cases . . . does not necessarily furnish the appropriate rules to govern" a case not involving a boundary dispute. Too much is also read into dictum in *Oregon ex rel. State Land Board* v. *Coevallis Sand and Gravel Co.*, 429 U. S., 363, 380–381 n. 8. (1977), taking issue with the dissent's meaning of the term "federal common law."

II

In *Borax Consolidated, Ltd.* v. *City of Los Angeles*, 296 U. S. 10 (1935), the City filed suit to quiet its title to land claimed to be tideland and to belong to the City by virtue of a grant from the state. The defendant claimed by virtue of a patent from the United States issued after California entered the Union. In an opinion by Chief Justice Hughes, and with a single dissent, the Court held that if land in question was tideland, the title passed to California at the time of her admission to the Union in 1850; that it remained to be determined whether the land at issue was tideland; and that this issue was "necesarily a federal question" controlled by federal law. The Court said that:

> "Petitioners claim under a federal patent which, according to the plat, purported to convey land bordering on the Pacific Ocean. There is no question that the United States was free to convey the upland, and the patent affords no ground for holding that it did not convey all the title that the United States had in the premises. The question as to the extent of this federal grant, that is, to the limit of the land conveyed, or the boundary between the upland and the tideland, is necesarily a federal question. It is a question which concerns the validity and effect of an act done by the United States; it involves the ascertainment of the essential basis of a right asserted under federal law. *Packer* v. *Bird*, 137 U. S. 661, 669, 670; *Brewer-Elliott Oil Co.* v. *United States*, 260 U. S. 77, 87; *United States* v. *Holt Bank*, 270 U. S. 49, 55, 56; *United States* v. *Utah*, 283 U. S. 64, 75. Rights and interests in the tideland, which is subject to the sovereignty of the State, are matters of local law. *Barney* v.

> *Keokuk*, 94 U. S. 324, 338; *Shively* v. *Bowlby*, *supra*, p. 40; *Hardin* v. *Jordan*, 140 U. S. 371, 382; *Port of Seattle* v. *Oregon & Washington R. Co.*, 255 U. S. 56, 63." *Borax Consolidated, Ltd.* v. *City of Los Angeles*, *supra*, at 22.

The Court went on to hold that tidelands extend to the mean high water line, which the Court then defined as a matter of federal law.

There was no question of accretions to the shoreline of the property involved in *Borax*. But some 30 years later, Mrs. Stella Hughes, the successor in interest to the owner of oceanfront property patented by the United States prior to the entry of the State of Washington into the Union, sued the State seeking to quiet her title to accretions that had become attached to her land and that had caused a seaward movement of the shoreline. Under Washington law, the accretions belonged to the state, the owner of the tidelands, and Mrs. Hughes would no longer own property fronting on the ocean. Under federal law accretions are the property of the upland owner. The trial court found that federal law applied. The Washington Supreme Court reversed, holding that Washington law applied and that the state owned any land that accreted after statehood. *Hughes* v. *State*, 67 Wash. 2d. 799, 410 P. 2d 20 (1966).

We in turn reversed, reaffirming the decision in *Borax* that federal law determined the boundary between state-owned tidelands and property granted under a federal patent and holding that the same law applied to determine the boundary between state-owned tidelands and oceanfront property where accretions had extended the shoreline seaward. *Hughes* v. *Washington*, 389 U. S. 290 (1967).[8] The justification for employing federal law was the special nature of the coastal boundary question: "The rule deals with waters that lap both the lands of the state and the boundaries of the international sea. This relationship, at this particular point of the marginal sea, is too close to the vital interest of the nation in its own boundaries to allow it to be governed by any but the 'supreme law of the land'". *Id.*, at 293. We went on to decide that under federal law, the federal grantee of the uplands had the right to the accumulated accretions.

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[8] All participating Justices joined except Justice Stewart who concurred on grounds that the state's claim to the property constituted a taking without compensation. He rejected the majority's application of federal law to the question. JUSTICE MARSHALL took no part in the case.

Except for the fact that in the present case, the upland to which the accretions attached has always been owned by the United States, this case and *Hughes* are similarly situated. Unless *Hughes* is to be overruled, judgment must be entered for the United States.

California urges that for all intents and purposes *Hughes* has already been eviscerated by *Oregon ex rel. State Land Board* v. *Corvallis Sand and Gravel Co.*, 429 U. S. 363 (1977). *Corvallis* involved a dispute between the state of Oregon and an Oregon corporation over the ownership of land that became part of a river bed because of avulsive changes in the river's course. The Oregon Court of Appeals affirmed the trial court's award of the land to the corporation because that was the result dictated by federal common law, which, under *Bonelli Cattle Co.* v. *Arizona*, 414 U. S. 313 (1973), was the proper source of law. A majority of this Court reversed, overruling *Bonelli* and holding that the disputed ownership of the riverbed should be decided solely as a matter of Oregon law. *Bonelli's* error was said to have been reliance on the equal-footing doctrine as a source of federal common law.[9] Once the equal-footing doctrine had vested title to the riverbed in Arizona, "it did not operate after that date to determine what effect on titles the movement of the river might have." 429 U. S., at 371. State, rather that federal law, should have been applied.

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[9] The equal-footing principle holds that all States admitted to the Union possess the same rights and sovereignty as the original thirteen States. *Pollard's Lessee* v. *Hagan*, 3 How. 212, 229 (1844); *Shively* v. *Bowlby*, 152 U. S. 1, 26, 30 (1894).

California urges that in rejecting *Bonelli* and holding that disputes about the title to lands granted by the United States are to be settled by state law, the Court also rejected *Hughes* since that case involved land that had been patented by the United States to private owners. We do not agree. *Corvallis* itself recognized that federal law would continue to apply if "there were present some other principle of federal law requiring state law to be displaced." 429 U. S. at 371. For example, the effects of accretive and avulsive changes in the course of a navigable stream forming an interstate boundary is determined by federal law. *Id.*, at 375. The *Corvallis* opinion also recognized that *Bonelli* did not rest upon *Hughes* and that the *Hughes* Court considered oceanfront property "sufficiently different . . . so as to justify a 'federal common law' rule of riparian proprietorship." 429 U. S., at 377 n. 6. The *Corvallis* decision did not purport to disturb *Hughes*.

Wilson v. *Ohama Indian Tribe*, 442 U. S. 653 (1979), made clear that *Corvallis* also does not apply "where the [United States] government has never parted with title and its interest in the property continues." *Id.*, at 670.[10] The dispute in *Corvallis* was between the state and a private owner of land previously in federal possession. In contrast, the riparian owner in *Wilson* was the United States, holding reservation land in trust for the Omaha Indian Tribe. The issue was the effect of accretive or avulsive changes in the course of a navigable stream. State boundaries were not involved. What we said in *Wilson* is at least equally applicable here where the United States has held title to, occupied and utilized the littoral land for over 100 years: "The general rule recognized by *Corvallis* does not oust federal law in this case. Here, we are not dealing with land titles merely derived from the federal grant, but with land with respect to which the United States has never yielded title or terminated its interest." 442 U. S., at 670.

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[10] The majority opinion in *Corvallis* appears to recognize that its rule does not extend to land remaining in federal hands:

"'We hold the true principle to be this, that whenever the question in any Court, state or federal is, *whether* a title to land which had once been property of the United States has passed, that question must be resolved by the laws of the United States; but that *whenever*, according to these laws, *the title shall have passed*, then that property, like all other property in the state, is *subject to state legislation;* so far as that legislation is consistent with the admission that the title passed and vested according to the laws of the United States.'" 429 U. S. at 377, (quoting *Wilcox* v. *Jackson*, 13 Pet. 498, 517 (1839) (emphasis added by *Corvallis* Court).

We conclude, based on *Hughes* v. *Washington* and *Wilson* v. *Omaha Indian Tribe*, that a dispute over accretions to oceanfront land where title rests with or was derived from the Federal Government is to be determined by federal law.

III

Controversies governed by federal law do not inevitably require resort to uniform federal rules. *Wilson* v. *Omaha Indian Tribe*, 442 U. S., at 672. It may be determined as a matter of choice of law that, although federal law should govern a given question, state law should be borrowed and applied as the federal rule for deciding the substantive legal issue at hand. *Board of Commissioners* v. *United States*, 308 U. S. 343 (1939); *Royal Indemnity Co.* v. *United States*, 313 U. S. 289 (1941). This is not such a case. First, and dispositive in itself, is the fact that Congress has addressed the issue of accretions to federal land. The Submerged Lands Act, 43 U. S. C. §§1301, *et seq.*, vested title in the States to the lands underlying the territorial sea, which, in California's case, extended three miles seaward from the ordinary low water line. The Act also confirmed the title of the States to the tidelands up to the line of mean high tide. Section 5 of the Act, however, withheld, from the grant to the States all "accretions" to coastal lands acquired or reserved by the United States."[11] 43 U. S. C. § 1313(a). In light of this provision, borrowing for federal law purposes a state rule that would divest federal ownership is foreclosed. In *Wilson*, where we did adopt state law as the federal rule, no special federal concerns, let alone a statutory directive, required a federal common law rule.

Moreover, this is not a case in which federal common law must be *created*. For over one hundred years it has been settled under federal law that the right to future accretions is an inherent and essential attribute of the littoral or riparian owner. *New Orleans* v. *United States*, 10 Peters 662, 717

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[11] In relevant part, § 5(a) of the Act, 43 U. S. C. § 1313(a), excepts from the grant to the States

"all tracts or parcels of land together with all accretions thereto, . . . title to which has been lawfully and expressly acquired by the United States . . . and . . . all lands expressly retained by or ceded to the United States when the State entered the union . . ."

Although "accretions" are expressly mentioned only in connection with federal "acquired lands," accretions to retained lands should be similarly excepted from the grant to the States. Former Solicitor General Cox, in an Opinion approved by the Attorney General, explained:

"There can be no doubt that Congress intended each of the various categories of lands excepted by section 5(a) to include accretions. The terms of section 5(a) make this clear. The customary rights of landowners are set forth in full in the first of the several exceptions listed in section 5(a). Thus, it speaks of 'all tracts or parcels of land together with all accretions thereto, resources therein, or improvements thereon . . .' Each of the other exceptions speaks simply of 'all lands.' Obviously, the more comprehensive word 'lands' was used instead of 'tracts or parcels of land' and the explicit reference to accretions, resources and improvements was omitted in order to avoid repetition. There is no reasonable basis for any other conclusion. Congress would not have limited its exceptions of 'all accretions thereto, resources therein, or improvements thereon' to lands 'lawfully and expressly acquired by the united States' from any State or its grantees and then denied them where the lands were 'expressly retained' or 'acquired by the United States by eminent domain proceedings, purchase, cession, gift, or otherwise in a proprietary capacity. . . .' 42 Op. Att'y Gen. 241, 264 (1963).

(1836); *County of St. Clair* v. *Lovingston*, 23 Wall. 46, 68 (1874). "Almost all jurists and legislators—both ancient and modern, have agreed that, the owner of the land thus bounded is entitled to these additions." *Jefferis* v. *East Omaha Land Co.*, 134 U. S. 178, 189 (1890), quoting *Banks* v. *Ogden*, 2 Wall. 57, 67 (1863). We rejected the invitation to rely on state law in *Hughes*, which California readily admits is a case "in which the facts and issues are essentially identical," California Statement in Support of Motion for Leave to File Complaint at 16, and we see no reason at this juncture to adopt California's minority rule on artificial accretions,[12] even if we were free to do so.

Applying the federal rule that accretions, regardless of cause, accrue to the upland owner, we conclude that title to the entire disputed land in issue is vested in the United States.

IV

Despite *Hughes* and *Wilson*, California claims ownership of the disputed lands because all of the accretions were deposited on tidelands and submerged lands, title to which, California submits, was vested in the State by the equal-footing doctrine and confirmed by the Submerged Lands Act. But California's claim to the land underlying the territorial sea was firmly rejected in *California* v. *United States*, 332 U. S. 19 (1947), which held that only land underneath inland waters was included in the initial grant to the states under the equal-footing doctrine. Furthermore, the Submerged Lands Act was a constitutional exercise of Congress' power to dispose of federal property, *Alabama* v. *Texas*, 347 U. S. 272, 273–274 (1954), and "did not impair the validity" of the *California* decision, *United States* v. *Louisiana*, 363 U. S. 1, 7, 20 (1960).[13] In any event, whatever the ownership of the submerged lands, this approach, based as it is on the equal-footing doctrine and the federal statute, is not a claim that state law should govern but a claim that the historic rule that accretions belong to the upland owner is wrong and should be replaced with a rule awarding title to the owner of the land on which the accretions took place. To accept this submission, however, would require rejecting not only *Hughes*, but also the long-established federal rule that accretions belong to the upland owner—a doctrine consistent with the majority rule prevailing in the States. See Part III, *supra*. Indeed, the proposed rule is also inconsistent with California's own law that accretions attributable to natural causes belong to the upland owner. For all these reasons, we refuse the invitation to depart from the long-settled rule.[14]

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[12] In *United States* v. *California*, No. 6 Orig., O. T. 1951, California argued that the "Court should adopt the federal rule that accretions formed by gradual and imperceptible degrees even though induced by artificial structures accrue to the owner of the adjoining land." Brief in Relation to Report of Special Master, at 90. California suggested "ample reasons why [the] exceptional California view should not be extended and applied in determining the boundaries of the marginal sea off California." *Id.*, at 91. Those reasons included the fact that the California rule is contrary to that adopted by courts of most other States, that the application of state law would lead to varying results in different states, and that the California rule was devised for wholly inapplicable reasons.

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[13] See also *Alabama* v. *Texas*, 347 U. S. 272, 273–274 (1954); *United States* v. *California*, 381 U. S. 139, 145–148 (1965); *United States* v. *Louisiana*, 389 U. S. 155, 156–157 (1967); *Texas Boundary Case*, 394 U. S. 1, 2 (1969); *United States* v. *Maine*, 420 U. S. 515, 524–526 (1975); *United States* v. *Louisiana*, 446 U. S. 253, 256, 268 (1980)

[14] For the same reasons, we reject California's alternative theory that the equal-footing doctrine vests title in the State to all lands that ever were tidelands. California argues that as deposition occurred on submerged land, these areas went to a tideland phase—vesting title in the state—before eventually emerging as uplands. Federal law governs the scope of title initially vested by the equal-footing doctrine; at most, this argument suggests a different federal rule should apply to former tidelands. The suggestion has little to recomend it. Even leaving aside the concerns expressed in text, we see no reason for an exceptional rule to apply to land that once was, but no longer is, tideland. Moreover, implementation of the rule would require plotting the high and low water lines at all interven-

Independent of the above analysis, California claims that the United States expressly surrendered title to the disputed land through the Submerged Lands Act. California argues the subject land falls within the general grant to the States of "lands beneath naviagable waters." Section 2(a)(3) of the Act defines "lands beneath navigable waters" to include "all filled in, made, or reclaimed lands which formerly were lands beneath navigable waters." 43 U. S. C. § 1301(a)(3). Because the jetty construction caused fairly rapid accretion, and, but for the construction of the jetties, the subject land would have remained submerged, California submits the accretion-formed land is "made" land, whose title rests in California by virtue of the Submerged Lands Act.

We do not read this provision of the Act as applying to the gradual process by which sand accumulated along the shore, although caused by a jetty affecting the action of the sea.[15] Moreover, to the extent that the accretions are to be considered "made" land, they would fall within the reservation by the United States of "all lands filled in, built up, or otherwise reclaimed by the United States for its use." This follows from the Congressional object to assure each sovereign the continuing benefit of landfill and like work performed by each.[16] In any event, § 5(a) of the Act expressly withholds

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ing times between statehood and the present.

[15] The word "made" was inserted into the provision in a bill introduced by Congressman Walter. H. R. 8137, 81st Cong., 2d Sess., § 2(a)(2) (1950). The report on that measure describes it as "in substance, the same" as earlier proposals omitting the term. H. R. Rep. No. 2078, 81St Cong.,2d Sess. 3 (1950). Throughout Congress' consideration of the bill there was no comment on the "made" land provision. No member of either House ever suggested that § 1301(a)(3) covered accretions that were attributable to artificial works. Against this background, we find no significance in the two casual references by Robert Moses and Senator Daniels to naturally formed accretions as "made." Hearings on S. J. Res. 13 et al. before the Senate Committee on Interior and Insular Affairs, 83d Cong., 1st Sess. 158, (remarks of Robert Moses); *Id.*, at 193–194 (remarks of Sen. Daniels).

[16] The Interpretive Opinion rendered by former Solicitor General Cox,

from the grant to the States all "accretions" to lands reserved by the United States and both California and the United States agree that the exposure of the formerly submerged lands in dispute constitutes "accretion." This reading of the Act adheres to the principle that federal grants are to be construed strictly in favor of the United States. *United States* v. *Grand River Dam Authority*, 363 U. S. 229 235 (1960); *United States* v. *Union Pacific R. Co.*, 353 U. S. 112, 116 (1957).

Finally, California submits that the Act granted title to the State by confirming the title of persons who, on June 5, 1950, were entitled to such lands ". . . under the law of the respective states in which the land is located . . ." 43 U. S. C. § 1311(a). This provision means nothing more than that state law determines the proper beneficiary of the grant of land under the Act; it is clear that federal law determines the scope of the grant under the Act in the first instance.

V

We reaffirm today that federal law determines the boundary of oceanfront lands owned or patented by the United States. Applying the federal rule that accretions of whatever cause belong to the upland owner, we find that title to the disputed parcel rests with the United States. Accordingly, California's motion for summary judgment is denied, and the United States' motion for judgment on the pleadings is granted. The parties, or either of them, may, before September 27, 1982, submit a proposed decree to carry this opin-

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while including naturally formed islands within the "made" language of Section 3, rejects the suggestion that accretion to the mainland, whether or not directly attributable to artificial causes, is included in the Submerged Lands Act grant to the states. 42 Op. Att'y Gen. at 259-265, 266-267. We express no opinion on the Act's treatment of naturally formed islands in the marginal sea.

ion into effect, failing which the Court will prepare and enter an appropriate decree at the next Term of Court.

It is so ordered.

[illegible]

[illegible] States [illegible] the [illegible] of the [illegible] United States. [illegible]

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[illegible]

SUPREME COURT OF THE UNITED STATES

No. 89 Original

STATE OF CALIFORNIA, EX REL., STATE LANDS COMMISSION, PLAINTIFF *v.* UNITED STATES

ON CROSS MOTIONS FOR JUDGMENT

[June 18, 1982]

JUSTICE REHNQUIST, with whom JUSTICE STEVENS and JUSTICE O'CONNOR join, concurring in the judgment.

I concur in the judgment. I believe that our decision in *Wilson* v. *Omaha Indian Tribe*, 442 U. S. 653 (1979), requires the application of federal common law to resolve this title dispute between the United States and California, and that § 5(a) of the Submerged Lands Act indicates the source of that law.

The dispute in this case concerns the ownership of artificially caused accretions on ocean front property belonging to the United States. The dispute centers on the legal effect of the movement of the "mean high water mark." That mark separates the fastlands continuously owned by the United States from the "tidelands"—the area of partially submerged lands between the mean high and low water marks. California's claim of title to the tidelands is based upon the Equal Footing Doctrine. Because the tidelands belong to it and because the accretions formed on the tidelands, California contends that state law applies to resolve this title dispute between it and the United States. The rule adopted by the California courts regarding artifically caused accretions holds that title to accreted land vests with the State rather than the riparian or littoral owner. The United States contends that federal common law applies and argues that the federal common law rule holds that title to land formed by accretion vests in the owner of the riparian land.

The dispute in this case is similar to that in *Wilson* v. *Omaha Indian Tribe.* We held in *Wilson* that federal common law and not state law governs title disputes resulting from changes in the course of a navigable stream where an instrumentality of the Federal Government is the riparian owner. 442 U. S., at 669–671. The rule of *Oregon ex rel. State Land Board* v. *Corvallis Sand & Gravel Co.*, 429 U. S. 363 (1977), was distinguished. The *Corvallis* rule—that state law governs—applies where the dispute over the legal effect of a shifting river bed does not involve claims of title by a federal instrumentality.

I agree with the Court that the *Wilson* rule applies to ocean-front property as well as river-front property where the Federal Government is the littoral owner. *Wilson* should apply to the movement of the high water mark along the ocean in a similar fashion as it applies to changes in the bed of a navigable stream. In the instant case, as in *Wilson*, it is irrelevant that the accretion, as a geographical "fact," formed on land within the State's dominion, be it a riverbottom or the ocean tidelands. The fact is that both *Wilson* and the instant case concern title disputes over changes in the shoreline where the Federal Government owns land along the shoreline.

In *Wilson*, we held that state law supplied the applicable rule of decision even though federal common law applied to resolve the title dispute. We found no need for a uniform national rule and no reason why federal interests should not be treated under the same rules of property that would apply to private persons. In contrast to *Wilson*, however, I agree with the Court that Congress in § 5(a) of the Submerged Lands Act has supplied the rule of decision. Section 5(a) withholds from the grant to the States all accretions to coastal lands acquired or reserved by the United States. I also agree with the Court that California did not acquire the disputed lands pursuant to the "made lands" provisions in § 3(a)(3).

Consequently, the Court's discussion regarding the continuing vitality of *Hughes* v. *Washington*, 389 U. S. 290 (1967), is *dicta*. *Hughes* is unnecessary to the resolution of choice-of-law issues in title disputes between the Federal Government and a State or private person. Reliance on *Hughes* would be necessary only if we were to hold that federal common law, rather than state law, applied in a title dispute between a federal patentee and a State or private persons as to lands fronting an ocean. The instant case does not present that issue. It is difficult to reconcile *Hughes* with *Corvallis* and we should postpone that endeavor until required to undertake it.

In summary, I think this case can be easily resolved as a title dispute between the United States and California concerning the legal effect of movement of the Pacific Ocean's high water mark. *Wilson* and the Submerged Lands Act resolve the dispute. The continuing vitality of *Hughes* should be left to another day.